FILED

(1)

NO. 96 758 NOV 12 1996

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ELEANOR TAYLOR,
Plaintiff-Petitioner
VS.

McLENNAN COMMUNITY COLLEGE,
DR. DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
MR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(95-50601)

John B. McNamara, Jr.
Counsel of Record
LaNelle L. McNamara
McNAMARA & McNAMARA
501 Franklin Avenue, Suite 500
Waco, Texas 76701
(817) 754-5456/753-0719 (fax)

ATTORNEYS FOR PETITIONER

31 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's summary judgment evidence was sufficient to raise fact issues on the following claims:

   A. Retaliation for exercising First Amendment right of free speech

   B. Retaliation for opposing discriminatory practices as protected by Title VII

   C. Deprivation of procedural due process

2. Questions that are essential to the determination of the ultimate legal issue cited above are:

   A. Whether Petitioner's refusal to enforce or support an employment practice/action that gave preference to one race to the detriment of other races constitutes "opposition" protected by Title VII and/or "speech" protected by the First Amendment.

   B. Whether an employment practice/action that gives preference to one race to the detriment of other races is a matter of "public concern" sufficient to invoke Petitioner's First Amendment rights if Petitioner is a member of one of the races detrimentally affected.

   C. Whether an employer's decision to implement/enforce an employment practice/decision that gives preference to one race to the detriment of other races constituted an "interest in efficient management" that outweighed Petitioner's First Amendment free speech right.

D. Whether Petitioner's refusal to implement or enforce an employment practice/decision that gave preference to one race to the detriment of other races is a "legitimate non-discriminatory" reason for termination of employment under Title VII.

3. Whether Petition was afforded procedural due process when her employment was terminated.

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES 2

LIST OF ALL INTERESTED PARTIES 4

CITATIONS FOR REPORTS OF LOWER COURT .. 5
DECISIONS IN THIS CASE

STATEMENT OF JURISDICTION 5
COURSE OF PROCEEDINGS BELOW
BASIS OF SUPREME COURT JURISDICTION

STATEMENT OF MATERIAL CASE FACTS 9

ARGUMENT 16

INDEX OF AUTHORITIES

CASES: **Page**

Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988), cert. denied, 489 U.S. 1053, 109 S.Ct. 1314, 103 L.Ed.2d 583 (1989) 21

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). 25,27

Davis v. Ector County, Texas, 40 F.3rd 777 (5th Cir. 1994) 21,22

Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985) 25

Findeisen v. North East Independent School District, 749 F.2d 234 (5th Cir. 1984) 27

Hall v. Ford, 856 F.2d 255, 260 (D.C.Cir. 1988), 21

Hill v. Pontotoc, Mississippi, 993 F.2d 422 (5th Cir. 1993) 27

Hopwood v. State of Texas, et al, 78 F.3d 932 (1996), cert. denied 116 S.Ct. 2580, Thurgood Marshall Legal, Etc. v. Hopwood, et al, (1996) 7,18,19,20,22

Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026 (5th Cir. 1982) 16

Moore v. Eli Lilly Co., 990 F.2d 812 (5th Cir. 1992) cert. denied, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993) 16

CASES: Page

Moyo v. Gomez, 40 F.3d 982 (9th Cir. 1994) 6,17

Mullane v. Central Hanover Bank & Trust Co., ... 25
339 U.S. 306 (1950)

Page v. DeLaune, ... 27
837 F.2d 233 (5th Cir. 1988)

Regents of University of California v. Bakke, ... 6
438 U.S. 265 (1978)

Rode v. Dellarciprete, 845 F.2d 1195, 1201-1202 (3rd Cir. 1988), ... 21

Wilson v. UT Health Center, ... 21,22
973 F.2d 1263, (5th Cir. 1992)

Wulf v. City of Wichita, 883 F.2d 842, (10th Cir. 1989), . 21

STATUTES: Page

United States Constitution

First Amendment 6,8

United States Code

28 U.S.C. § 1254(1) 5
42 U.S.C. § 2000(e) et seq ("Title VII") 6,8

Federal Rules of Civil Procedure

Rule 56(c) 16

LIST OF INTERESTED PARTIES

PETITIONER:

Eleanor Taylor
Rt. 6, Box 344
Waco, Texas 76706

COUNSEL FOR PETITIONER:

John B. McNamara Jr., Counsel of Record
LaNelle L. McNamara
McNAMARA & McNAMARA
501 Franklin Avenue, Suite 500
Waco, Texas 76701

RESPONDENTS:

McLennan Community College
Dr. Dennis Michaelis
Dr. Deborah Garrett
Mr. Richard Coronado
Mr. Mike Jones
1400 College Drive
Waco, Texas 76708

COUNSEL FOR APPELLEES:

Philip E. McCLeery
SHEEHY, LOVELACE & MAYFIELD
510 N. Valley Mills Dr., Suite 500
Waco, Texas 76710

Ronald Scott
Lisa Ann Brown
BRACEWELL & PATTERSON
2900 S. Tower Pennzoil Place
Houston, Texas 77002

CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Western Division of Texas, Waco Division: not yet reported

United States Court of Appeals for the Fifth Circuit: not yet reported

STATEMENT OF JURISDICTION

Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered its judgment on the 26th of June, 1996. (A copy of the Fifth Circuit Judgment and Opinion is filed with this Petition in a separate volume designated as an "Appendix" to the Petition.)

A Petition for Rehearing was timely filed and was overruled on the 13th of August, 1996.

Supreme Court Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from a summary judgment entered by the United States District Court for the Western District of Texas, Waco Division. (A copy of the District Court's Order is filed with this Petition in a separate volume designated as an "Appendix" to the Petition.)

This Petition is filed for two purposes: (1) to secure uniformity of decisions between Circuit Courts of Appeals and (2) to bring up a question of importance that

significantly affected this case and which is of grave public interest in the area of employment and civil rights as follows:

(1) The record in this case established that the major reason for Taylor's discharge was her alleged "refusal" to implement the Defendants' employment policies/decisions which required her to diversify her staff by recruiting Hispanic staff (District Court Opinion, p. 32-34, R. 1494-1496, adopted by the Fifth Circuit, Judgment and Order, p. 2.) The District Court (and the Fifth Circuit, by adopting the District Court's opinion) found that Taylor's "refusal" to implement the policies was not the equivalent of speaking out against discriminatory practices of public concern (D.C.Op., p. 26-27, R. 1488-1489), that Taylor's "refusal" essentially constituted insubordinate behavior, and that Taylor's discharge for such "insubordinate" behavior could not support her claims for retaliatory discharge under Title VII (i.e., "opposition") and/or under the First Amendment (D.C.Op. p. 32-34, R. 1494-1496; and p. 44-46, R. 1506-1508). The Court's decision in this case conflicts with the decision of the Ninth Circuit in Moyo v. Gomez, 40 F.3d 982, (9th Cir. 1994) cert. denied 115 S.Ct. 732, wherein the Court held that "Opposition can, of course, consist of a refusal to carry out an order or policy." (emphasis added, at 984); and

(2) Almost twenty years ago, in considering medical school admission standards, this Court explained that government action "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake", forbidden by the Constitution. Regents of

University of California v. Bakke, 438 U.S. 265, 307 (1978). On July 1, 1996 (only one week after this case was decided by the Fifth Circuit on June 26, 1996), this Court denied certiorari (116 S.Ct. 2580) in the case of Hopwood v. State of Texas, et al, 78 F.3d 932 (1996), wherein a panel of the Fifth Circuit declared the University of Texas Law School admissions policy unconstitutional because the policy "elevate[d] some races over others", and declared that the policy was unconstitutional even though it was adopted "for the wholesome purpose of correcting perceived racial imbalance in the student body" (Id., at 934). In the instant case, the Defendants charged Taylor with "failure or refusal to diversify her staff" as required by the College's Affirmative Action Plan, and decided that Taylor would not be allowed to employ qualified black and white employees that had served as her faculty in the past unless and until she employed an hispanic in a faculty position. Later the College declared that all faculty positions were vacant and the College re-advertised for new applications. Taylor opposed the College's decisions and/or the alleged "policy" as it was enforced by Defendants. She was reprimanded for her "failure or refusal to diversify her staff", and the "failure to diversify her staff" was the only factual basis cited for the termination of Taylor's employment in the summary judgment affidavit of the College President, Michaelis, who was the final decision-maker with respect to the termination. Even though the District Court (and, by adoption, the Fifth Circuit) assumed "arguendo that Plaintiff was told she could not hire any Blacks or Whites until she hired an Hispanic" (at p. 26, R. 1488), the Court disregarded the fact that the College's employment decision/order constituted discrimination per se, i.e. was a decision/order made

solely on the basis of race, and held that "MCC's interest in efficient management of its operations clearly outweigh[ed] Taylor's interest in commenting on MCC's request for her to diversify her staff (p. 26, R. 1488). Furthermore, despite Taylor's summary judgment testimony that she was told by the College that she could not hire any Blacks or Whites until she hired an Hispanic, the District Court (and, by adoption, the Fifth Circuit) held that Taylor did not provide any "direct" evidence of discrimination and that she "must prove her claims of disparate treatment and/or retaliatory discharge inferentially" (D.C.Op. p. 42, R.1504). The Defendants admitted that one of their justifications for Taylor's discharge was her refusal to "diversify her staff"; therefore, if Defendants' policy of "diversification" was per se discrimination in that the policy gave preference to one race to the detriment of other races, then there is clearly "*direct*" evidence of unlawful retaliation against Taylor for opposing discriminatory practices and Defendants summary judgment on Taylor's retaliation claims should have been denied. Per se racial discrimination in the employment setting significantly impacts individual opportunity and violates the principle of racial equality; and it is gravely important that this Court affirm that per se racial discrimination in an employment setting solely for the purpose of "diversity" is just as unconstitutional as per se discrimination in other situations (e.g., school admission). Further, it is gravely important that this Court affirm that an employment practice that constitutes per se discrimination is of sufficient public concern that opposition to such a practice invokes both First Amendment and Title VII protections, regardless of the fact that the person opposing the practice may be

a member of the class adversely affected by the practice.

STATEMENT OF MATERIAL FACTS

Petitioner Taylor was hired by Respondent McLennan Community College ("College") as a Counselor for the Special Services program in September of 1980. In 1985, Taylor submitted a grant proposal to the U. S. Department of Education to establish an Upward Bound program at the College. The grant was awarded in 1986, and Taylor became the Coordinator for the new Upward Bound program. Taylor continued to work in that position until February 11, 1993, when she was notified that her employment was terminated effective March 31, 1993. The authority to terminate Taylor's employment was vested in Dr. Dennis Michaelis, President of the College. Michaelis' termination letter stated that Taylor's employment was being terminated because of her "failure to adhere to College policies and directions" and "acts of insubordination" (R.512), but no specific factual bases for these conclusions were stated in the letter. Dr. Michaelis' summary judgment affidavit stated that he believed "that Mrs. Taylor did an overall good job with Upward Bound and that it is very unfortunate that she so strongly resisted the direction of her superiors" (R.425); the only factual example of Michaelis allegation of Taylor's "resistance to direction" was her alleged "refusal or inability to diversify the staff of Upward Bound" (R.424). Respondent Jones had been promoted to become Taylor's immediate supervisor in April of 1992 and continued in that position until he was demoted after Taylor's discharge. Jones recommended Taylor's discharge in a letter dated February 2, 1993, which stated that Taylor "consistently disobeyed orders in following EEO hiring guidelines" (R.548). Jones testified in deposition that this statement specifically

referred to issues relating to the hiring of instructors for the summer of 1992 (R.1092). Respondents contended in the district court and on appeal that "one of the administration's major concerns with Upward Bound was Taylor's refusal or inability to attract Hispanic employees" (Appellee's Brief, Fifth Circuit, p. 6).

The Upward Bound program was staffed with part-time teaching faculty who were employed to teach the students during the regular academic year (i.e., Fall and Spring semesters) and for a six-week summer session. The procedure for hiring these teachers was set forth in the Upward Bound grant renewal application for the 1989-90, 90-91, and 91-92 academic years (R.1290). The grant proposal was approved and signed by Michaelis and provided that "teachers" and other "part-time staff" were to be recruited through community contacts "by the Program Director"..."at the beginning of the program as well as for vacancies" (R.1290). The grant also contemplated that part-time faculty would be continued in their employment from year to year, depending on satisfactory performance. Specifically, the grant stated that "A one-on-one evaluation will be conducted by the Director...at the end of each component for part-time staff to evaluate job performance and to recommend continuance or non-continuance with the program" (R.1293).

In October of 1990, Michaelis sent a letter to Taylor's supervisor, Dr. LaVerne Wong, expressing concern that there was "NO Hispanic representation on the Upward bound staffing" and concluding that "we must make every attempt in the future to see that broader ethnic representation be accomplished" (R.510). When Dr. Wong mentioned this communique to Taylor, Taylor wrote a grant request for supplemental funding for a new full-time position for an Upward Bound bilingual counselor (a/k/a

"academic coordinator" per supplemental grant proposal), which was designed to benefit Hispanic students and predicted to attract qualified Hispanic applicants for full-time employment. The supplemental grant request was approved and funded by the Department of Education in 1991, but the bilingual counselor's position was not filled until 1993 the Defendant College did not provide space for the additional staff person and did not authorize filling the position until after Taylor was discharged (R.1201, 1299-1327). The College was well aware of the fact that this position was fully funded but was still vacant in April of 1992 because the position was clearly shown as a "vacant" position in the Upward Bound program on an organizational chart dated April 9, 1992 and forwarded to Michaelis by Garrett when the Student Services Division was reorganized and Jones became Taylor's immediate supervisor (R.1226). Also Garrett and Jones admitted that they knew about the availability of the position (R.645-646; R.1124-1126,1129).

In May of 1991, Taylor recommended continued employment of part-time faculty for summer school and in September of 1991, Taylor recommended employment of part-time faculty for the 1991-92 regular academic year. Both sets of recommendations were approved by her immediate supervisors, Wong and Garrett (who succeeded Wong when she retired in August of 1991). Both sets of recommendations were also approved by Respondent Coronado, the college's Personnel Director and EEO Officer, without question or comment (R.1213).

In the Spring of 1991, Taylor was called to testify in an OCR investigation into a charge of racial discrimination by the College; the charge had been filed by a Black Female. Taylor was called as a witness because she had been denied an opportunity to apply for a promotion to a

supervisory position that had been created in her division in late 1990 or 1991. The position had not been advertised for competitive application and a white female had been selected to fill the position. (R. 756-762) Taylor did not learn that the OCR report had been completed until the spring of 1992; and in early May of 1992, Taylor requested that Coronado furnish her a copy of the OCR investigative report (R. 827-828).

Also in May of 1992 (shortly after Taylor requested a copy of the OCR report), Taylor submitted her recommendations for employment part-time Upward Bound faculty for the summer program. All persons that Taylor recommended had previously been employed as part-time faculty in the Upward Bound program and were entitled to be continued in their employment under the terms of the Upward Bound grant document, cited above, so long as they received satisfactory performance evaluations. The employment histories of the recommended faculty at the college was: Doris Londonberg, employed since 1988 (R.1229); Alex Carter, employed since October of 1990 (R.1241); Wendell Hudson, employed since 1991 (R. 1242); Wayne Watlington, employed since 1988 (R.1245); and Henry Jennings, employed since September of 1990 (R.1252). Taylor's recommendations were approved by Jones and Garrett, but were totally rejected by Coronado (R. 903-908). On May 29, 1992, Coronado and Jones told Taylor that her recommendations would not be approved because (1) she had not advertised the positions and (2) she had not recommended an "Hispanic" for employment (R.1213). Taylor had never before been told that she had to "advertise" part-time positions and the College had no written policy requiring that any part-time positions be advertised until September, 1992 (R.1213, 1262). Nonetheless, the College steadfastly refused to continue the employment of the entire summer teaching faculty--white

and black--unless and until an Hispanic was hired (R. 1119-1124; 1440).

On June 24, 1992, Taylor was formally reprimanded for not having employed "Hispanics" and Jones stated that "this criteria must be met before I will make any employment recommendations for the Upward Bound Program" (1440, emphasis added). Jones testified that this edict came from the "president of the college" (R.1092-1095; 1119-1124). The June 24th reprimand clearly stated that the failure to comply with directives would result in termination of Taylor's employment (R.533). The summary judgment record contains no written reprimands issued to Taylor prior to June 24, 1992, and Taylor's last performance evaluation prior to her discharge and delivered in 1991, had been an excellent evaluation (R.1210,1374-1382).

On July 2, 1992, Taylor delivered a detailed response to Jones' June 24th reprimand (R.1442-1454) and furnished Jones copies of her response for delivery to Garrett, Coronado, and Michaelis (R.1454). In her response, Taylor did clearly state her objection to the College's refusal to continue the employment of Upward Bound faculty during the summer unless and until an Hispanic was hired. Taylor also clearly stated that her opposition to the college's decision was based on the fact that the College's action discriminated against the white and black employees who were qualified and who merited continued employment. Specifically, Taylor stated:

> You have indicated to me that the refusal to hire the part-time staff recommended for the summer program was based on the policy of the college not to discriminate in its employment practices. Yet it appears to me that the course of action taken has resulted in rather than avoided discrimination since

> **all blacks and all whites who were qualified to be employed in this program have been denied employment because the college refused to hire these qualified employees unless a Hispanic was hired first.** (R.1453, emphasis added)

Most of the employees who had been recommended for employment worked with the Upward Bound students, without pay, during the summer because they were concerned about the students who would otherwise be deprived of the educational benefits of the program. The employees requested to meet with Jones and expressed their concern about providing continuity of instruction for the students; however, Jones disregarded the faculty's concerns because, as far as he was concerned, "following directives and insubordination were bigger issues" than the students' needs (R.1118).

On July 14, 1992, Jones issued another written reprimand to Taylor (R.542). This reprimand was also related to the College's decision not to continue Upward Bound faculty as employees during the summer session. Jones chastised Taylor for not obtaining statements from the faculty, acknowledging that they were working with the students as "volunteers" and would not be paid. In his July 14th reprimand, Jones stated that Taylor's actions during the summer of 1992 had placed her employment "in jeopardy" and also stated that if Taylor continued to "violate policies", Jones would have "no choice but to recommend...termination of employment" (R.542). Taylor also furnished a detailed response to Jones' July 14th reprimand (R.543-545).

On August 10, 1992, Jones issued another reprimand to Taylor and reminded her that if she did not work with him and the Personnel office in "diversifying" her staff, her

employment recommendations would not be approved and the Upward Bound program would not begin in the Fall of 1992. He again emphasized that the "failure to follow the directives in this memorandum are grounds for and will result in termination of...employment" (R.547-548).

The Upward Bound faculty that were qualified for the Upward Bound teaching positions and who had been employed in the program before May of 1992 were required to re-apply for positions in the program in the Fall of 1992. The College advertised all part-time Upward Bound faculty positions. No qualified Hispanic applied, was interviewed, or hired; in the process, however, the Upward Bound education program was again shut down from September 1st to November 15, 1992 because of the College's delay in hiring personnel (R.1136-1139; 1148-1149).

No reprimands were issued to Taylor between August 10, 1992 and February 11, 1993, when she received the President's termination letter (R.989, 1183). Jones' letter recommending Taylor's discharge (which was never furnished to Taylor until after this lawsuit was filed) did not contain any specific dates or identify specific events that occurred after August of 1992 and precipitated his recommendation; and Jones could not identify any specific examples of alleged misconduct or insubordination that occurred between August of 1992 and February of 1993, except an incident involving exposure to toxic fumes in the workplace, which incident formed the basis of a worker's compensation claim filed by Taylor (and her staff) against the College (R.1183-1186).

Dr. Michaelis was the official who ultimately made the decision to terminate Taylor's employment. The only factual basis for Taylor's discharge that was described by Michaelis in his summary judgment affidavit was Taylor's

"refusal or inability to diversify the staff of Upward Bound" (R. 424).

ARGUMENT

Standard of Review

A court's grant of a summary judgment is to be reviewed de novo. Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc. 669 F.2d 1026, 1031 (5th Cir. 1982). In determining whether summary judgment was proper, the Court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment; and all reasonable doubts as the existence of a genuine issue of material fact must be resolved against the movant. Moore v. Eli Lilly Co., 990 F.2d 812, 815 (5th Cir. 1992), cert Denied, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993).

1. "Refusal" to carry out an order or policy. In the instant case, the District Court, and the Fifth Circuit, by adopting the District Court's findings and conclusions, essentially held that the mere refusal to carry out an order was not sufficient to constitute "opposition" to the alleged discriminatory practices.[1] More importantly, this case

---

[1]Actually the District Court (and the Fifth Circuit, by adoption) erroneously found that Taylor did not verbally protest the discriminatory practices at the time that they occurred (D.C.Op. p. 26-27, R. 1488-1489). The summary judgment record

stands for the proposition that "refusal" to comply with an employer's order, even if the order is unconstitutional discrimination, is "insubordination" that justifies termination. This holding is diametrically opposed to the holding in the case of Moyo v Gomez, 40 F.3d 982, 984 (9th Cir. 1994), cert. denied 115 S.CT. 732 (1995). The disparity between the holding in this case and in the Moyo case is particularly significant since the Defendants themselves cited Taylor's refusal to comply with the directives to "diversify" her staff was a major "concern" (Michaelis Aff., R. 424) that precipitated the termination of her employment. Thus, if her "refusal" was protected activity and if it caused her termination, her retaliation claim is established--at least for purposes of a summary judgment--unless Defendants can establish that she would have been discharged regardless of her protected activity.

2. Discrimination per se. The most glaring error in the holdings of the courts below is the total lack of recognition that an Affirmative Action Plan can indeed constitute discrimination per se, if it prefers one race over another without justification by a compelling state interest. The error of the courts is best exemplified in the following excerpt from the District Court's opinion:

> "Plaintiff seeks to turn the College's alleged desire to have her program more accurately reflect the racial

---

below included Taylor's affidavit and exhibits attached thereto and incorporated by reference therein. One of the exhibits was Taylor's memo of July 2, 1992 delivered to all four individual defendants, wherein she expressly stated that "...the course of action taken has **resulted in rather than avoided discrimination since all blacks and all whites who were qualified to be employed in this program have been denied employment because the college refused to hire these qualified employees unless a Hispanic was hired first.**
(R. 1453, emphasis added)

composition of her students into a claim of racial discrimination. However, MCC's summary judgment evidence indicates that the purpose was to follow EEOC guidelines and to have the staff members of MCC reflect the composition of the students. This fact is especially important in programs like Upward Bound where the purpose is to encourage students from disadvantaged backgrounds to stay in school and to realize that they can achieve success through education. By having someone of a like race serve as an instructor, the goals of the program are furthered because he serves as a role model that 'someone like me' can succeed." (D.C.Op. p. 32, R. 1494)

Defendants offered no expert testimony that this principle was even valid; instead, the principle was stated as a belief or conclusion on which their decisions were based.

On March 18, 1996, the Fifth Circuit Court of Appeals issued an opinion in Hopwood v. State of Texas, et al, 78 F.3d 932 (1996). The Supreme Court denied the petition for writ of certiorari in the Hopwood case on July 1, 1996, four days after the Fifth Circuit rendered its opinion in the instant case. Thurgood Marshall Legal, Etc. v. Hopwood, et al, cert. denied, 116 S.Ct. 2580. Although this case involves race discrimination in employment, as opposed to law school admission, the principles and law governing the decision in Hopwood are equally applicable to the case at bar. The damage accruing from the type of discriminatory action that occurred in this case is certainly as significant as the impact of the discriminatory practice at issue in Hopwood. In Hopwood, students were denied admission to law school based on differential standards adopted to favor minorities that were underrepresented in the student population of the school. In the instant case, the College had already admitted qualified faculty into the

workforce of the Upward Bound program; and, under the terms of the grant awarded by the United States Department of Education, all of the faculty were eligible to be continued in the employment of the College if their performance was satisfactory. Despite the fact that Taylor had evaluated and recommended the faculty for continued employment, the College decided that all of the faculty would be denied continued employment during the summer terms of 1992, and that the faculty positions previously filled by qualified Black and White faculty would be declared vacant and the former employees would be forced to reapply because one race (Hispanic) was not represented in the faculty as it had previously been constituted. The college's actions in this case would be completely analogous to Hopwood if Hopwood had been granted admission into the U. T. Law School but had later been dismissed and forced to reapply because minorities were underrepresented in her class. The discriminatory conduct in this case is even more outrageous when one considers that the college did not advertise and recruit Hispanics to fill the full-time vacant bilingual counselor's position in Upward Bound before taking the extreme action of disenfranchising the existing part-time faculty merely because no Hispanic had been recommended for a part-time position.

The college in this case, like the law school in Hopwood, offered no justification for its action denying continued employment to the Upward Bound faculty other than to claim that the conduct was justified by the "perceived racial imbalance" (Hopwood, p.1.) in the Upward Bound workforce and by the fact that Taylor was supposedly told to correct the imbalance but failed to do so. Neither of these excuses is sufficient to meet the strict scrutiny test of Hopwood if the conduct of the College did indeed have the effect of elevating some races over others. Ibid, p. 1, 6. The college, like the law school in Hopwood, also attempted

to justify its action by claiming that its "Affirmative Action Plan" was imposed on the college by its contract with the U.S. Department of Education. This argument also does pass muster since the implementation of the affirmative action plan would be controlled by the college and would still have to meet the requirements of strict scrutiny under Hopwood. Ibid, p.19.

Petitioner clearly pointed out to the District Court and to the Fifth Circuit that she voiced her opposition to the college's discriminatory employment action in the summer of 1992. Taylor's summary judgment affidavit attached as a exhibit and incorporated by reference her July 2nd Memo, that had been distributed to Jones, Garrett, Coronado, and Michaelis. The memo recited in great detail Taylor's discussions with Coronado and Jones when the decision to reject her employment recommendations was first communicated to her in late May of 1992, shortly before the Upward Bound students were due to arrive on campus for the summer program; and also stated that the decision of the college had discriminated against the qualified balck and white employees that had been recommended for continued employment. (The relevant text of the Memo is quoted on p. 15-16 of the Statement of Material Facts above.)

In summary, the principles articulated in Hopwood compel this Court to hold that the College's employment action in the summer and fall of 1992 was race discrimination per se and was unconstitutional absent some very compelling interest.

3. Protected Speech. If the College's action was discrimination per se, then the question of whether Taylor's opposition addressed a matter of "public" concern must be answered in Taylor's favor. Race discrimination by a public

entity or public official is a matter of "inherently great public concern." Wilson v. UT Health Center, 973 F.2d 1263, 1269 (5th Cir. 1992).

The summary judgment record in this case does not support the District Court's judgment or the Fifth Circuit's opinion that Taylor's speech was not of public concern and was not intended to protect the public interest of discrimination-free work places (Panel Decision, Subparagraph 3). In 1990, Taylor complained about a racial epithet in an assigned textbook, acting at the behest of students (R.1192). In 1991, she testified in response to an Office of Civil Rights investigation about a college employment practice that affected her (R.1192) and about employment practices that had affected others (R.1212,1209). In 1992, when Taylor objected to the college's decision to "stop" the Upward Bound program and not to continue employment of the part-time faculty until a Hispanic was hired, her complaints were made on behalf of Upward Bound staff and students. Although Taylor's complaints did include one matter that affected her directly (1991) and another that affected her indirectly (1992), Taylor's speech can and does rise to the level of a predominantly "public" concern, rather than speech of a purely personal nature. Wilson v. UT Health Center, cited supra, 1268-1270 and in Davis v. Ector County, Texas, 40 F.3rd 777 (5th Cir. 1994). "A topic otherwise of public concern ...[does not]...*lose* its importance merely because it arises in an employee dispute." Hall v. Ford, 856 F.2d 255, 260 (D.C.Cir. 1988); see also Wulf v. City of Wichita, 883 F.2d 842, 860 n.26 (10th Cir. 1989); Rode v. Dellarciprete, 845 F.2d 1195, 1201-1202 (3rd Cir. 1988). The content of the disputed speech rather than the motive behind its utterance is the "greatest single factor" in the analysis. Belk v. Town of Minocqua, 858 F.2d 1258, 1264 (7th Cir. 1988),

cert. denied, 489 U.S. 1053, 109 S.Ct. 1314, 103 L.Ed.2d 583 (1989).

In Wilson, cited supra, a sergeant in the UTHC police force claimed she was demoted and discharged in retaliation for reporting sexual harassment. Her reports had been made within the UTHC police force. The trial court dismissed her claim, finding that her speech was not of public concern but was of personal concern to herself as a victim of alleged sexual harassment. The Fifth Circuit reversed, holding that sexual harassment "like race discrimination" is a matter of "inherently great public concern". Wilson, at 1269. The Court also noted that the fact that the speech is delivered in a private forum (within the employment setting) does not detract from the fact that the issue addressed is of "public" concern, when the concern is expressed both as a citizen and as an employee. Wilson, 1270. The dual role of the speaker was also been cited in Davis, wherein this Court held that the speech was of public concern even if the speaker's motive was to strengthen the credibility of a sexual harassment claim that had been filed by his wife and was pending adjudication. As in Wilson and Davis, Taylor's speech focused on an issue of inherently great public concern and her expressions, as a whole, should be protected, despite the fact that she was a minority and despite the fact that she had once complained about a discriminatory practice that had directly impacted her.

4. Employer's interest in efficient management. Again, if the principles stated in Hopwood are applicable to this case and the College's decision not to continue the employment of qualified faculty was racial discrimination per se, the facts in this case cannot support the District Court's judgment or the Fifth Circuit's decision that the college's interest in efficient management of its operations "clearly outweigh Taylor's interest in commenting on MCC's

request for her to diversify her staff." (emphasis added, District Court's Opinion, R. 1488). There is no evidence that Taylor caused any disruption. She voiced her opposition to the College's discriminatory action by her actions and by her express notice to the administration that she considered the decision to discontinue the employment of qualified faculty to be discrimination. She and her rejected faculty did actively resist the decision of the administration when they continued to operate the summer program for the students even though the faculty was not approved and was not being payed for their services. Essentially Taylor tried to do her job by delivering much-needed educational services to an economically disadvantaged student population. Also, Taylor's opposition was directed primarily through the chain of command.[2] If disruption occurred, it was because the college's action of trying to shut down the Upward Bound program was abrupt and totally unreasonable, causing confusion and chaos among the staff, the students, the parents and the public at large. The faculty is the most important element of an educational program and the decision to discontinue the employment of faculty was the decision of the college--not Taylor. The college should have been able to predict the disruption that would be caused by such an impulsive move. In summary, it is difficult--to say the least--to comprehend how the total elimination of faculty positions for a summer session and part of a fall session can promote the "efficient management of operations" of an educational program. It is also difficult to comprehend how the College's stated objective--i.e., to diversify the staff--compelled the sudden and drastic action of discontinuing the services of a program pending

---

[2]The fact that Taylor primarily relied on opposition directed through the chain of command was erroneously cited as support for the Disctrict Court's conclusion that her opposition did not relate to a matter of "public concern" (D.C.Op. p.27, R.1489)

recruitment and hiring of an Hispanic part-time faculty member.

5. Causation. Petitioner's summary judgment evidence was also sufficient to raise a fact issue regarding whether or not Taylor's employment was terminated because of her opposition to discriminatory practices. Respondents have all but admitted that Taylor was terminated because she did not follow her superiors' directives to stop delivering an education to the Upward Bound students until an Hispanic was hired,--euphemistically "diversify" her staff. In other words, Taylor did not agree with the directives of her supervisors insofar as the directives required that all faculty positions be declared vacant solely because there was not an Hispanic working in the program; and she both resisted the College's action and stated her opposition. The record contains no written reprimand of Taylor, from the inception of her employment in 1980 until 1992--after the college told her that the faculty would not be continued in employment unless and until an Hispanic was hired. The college characterizes Taylor's resistance to its directives as "insubordination"; Taylor characterizes her action as "opposition to discriminatory practices." Both agree that the situation was a substantial and motivating factor in her termination. Clearly a jury should decide the issue of causation.

If the college's refusal to continue the employment of Upward Bound faculty in the summer of 1992 until a Hispanic was hired is discrimination per se, then it is clear that the faculty would have had a legal cause of action for discrimination. Why is it not equally clear that Taylor, who opposed the action because it was discrimination per se, and was subsequently discharged for disagreeing with and actively opposing management's directive to discriminate, is also entitled to pursue a legal remedy for the retaliation she

suffered as a result of the injustice to the faculty and her opposition to the College's action?

6. Procedural Due Process. The District Court correctly held that Petitioner was a public employee with a property interest in his or her current and/or continued employment[3] . Therefore, Petitioner had a right to procedural due process prior to and subsequent to termination. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

The essential requirements of procedural due process are (1) notice and (2) hearing; and the hearing procedures afforded to the employee must be "fair". Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985). Petitioner contended that the Defendants not only failed to provide a pre-termination hearing but that the post-termination procedures were inadequate to meet the requirements of due process.

The primary inadequacy cited by Petitioner was the lack of notice of the charges and evidence against her. (Appellant's Brief, pp. 28-32). It was and is Petitioner's position that she received no reprimands, warnings, or other notice of improper conduct between August 20 (when she received the August 10 memo from Jones) and February 11, 1993, when she was told that a decision had been made to terminate her employment. The written document (i.e., Michaelis' letter) furnished on February 11, contained no factual allegations, but merely stated conclusions that she had continued to violate policies and had been

---

[3]At the time of her termination, Taylor was working under a written contract of employment that extended through August 31, 1993 (D.C.Op.,p.11-12, R. 1473-1474).

insubordinate. Defendants did not dispute Petitioner's contention that the summary judgment record in this case contains no notice of specific improprieties between August 20, 1992 and February 11, 1993. On page 30 of Appellee's Brief in the Fifth Circui, Defendants contended that Petitioner had adequate notice; but the only evidence cited by Defendants were memos between Jones and Taylor (and others) drafted in the summer of 1992, i.e. a memo from Jones dated June 23, 1992 (R. 532-533) and other correspondence as follows: an undated memo from Jones to Taylor, a memo from Taylor to Jones dated June 29, 1992, a memo from Jones to Taylor dated July 2, 1992, a response from Taylor to Jones, dated July 6, 1992, a memo from Taylor to Staff dated July 6, 1992, a memo from Jones to Conine dated July 1, 1992 (with no copy shown to Petitioner), a memo from Jones to Taylor dated July 9, 1992, a memo from Jones to Taylor dated July 14, 1992, a memo from Taylor to Jones dated July 27, 1992 (R. 535-545). Petitioner's Affidavit stated that her "last warning, reprimand, or notification of any allegation of wrongdoing...was contained in the memo dated August 10...and delivered...on August 20, 1992", that the letter terminating her employment " referenced no specific policies or procedures that authorize the College to terminate my written contract" and that she "asked for specific information about the reasons for the termination", but none were ever furnished to her (R. 849-850; 1214-1215). The conclusory statements made by Mr. Jones in his recommendation to terminate Petitioner's employment appeared to include numerous charges that were not made in his memos in the summer of 1992. It is undisputed that the Jones' February letter recommending Taylor's discharge (R. 246-247) was not furnished to Taylor on February 11, 1993 and was not furnished thereafter when she requested more specific information about the reason for her discharge.

Due process requires that the employee receive "notice and an opportunity to respond". Page v. DeLaune, 837 F.2d 233, 239 (5th Cir. 1988) quoting from Loudermill, 105 S.Ct. at 1495. (See also other cases cited in Page at 239); Hill v. Pontotoc, Mississippi, 993 F.2d 422, 424 (5th Cir. 1993) wherein the plaintiff claimed that notice was not sufficient to meet minimum procedural due process requirements; and Findeisen v. North East Independent School District, 749 F.2d 234 (5th Cir. 1984), wherein the Court emphasized the importance of a pre-termination hearing rather than merely a post-termination remedy.) In Page, the Fifth Circuit reversed a summary judgment granted by the District Court because the employer did not furnish Page adequate notice of her wrongdoing. Specifically, in Page, the plaintiff asserted that she had received no criticism of her work from her supervisors between January of 1982, when she received a memo threatening termination in the event of "a repeat performance", and December, 1982, when she was discharged. In Page, the District Court held that the January memo was sufficient to meet the "notice and opportunity to respond requirement" of procedural due process. The Fifth Circuit, however, held that "effective notice must convey the specific reasons for termination; the January, 1982 memorandum did not do so" (at p. 239). Because the Page defendants failed to meet the minimum notice requirement for procedural due process, the Court reversed and remanded Page's claim for violation of procedural due process.

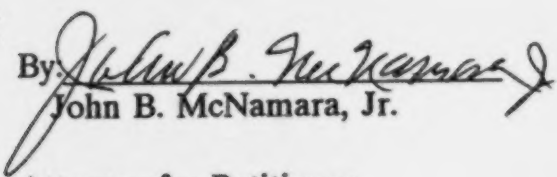
In the instant case, the Defendants also wholly failed to provide Taylor with adequate notice of the charges against her. As this Court said in Loudermill, "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the

story". The District Court in this case, and the Fifth Circuit, erred in holding that the memos from the summer of 1992 (six months prior to Appellant's termination) and the conclusory letter of February 11, 1993 constituted "notice" sufficient to meet the minimum due process requirement; and Taylor's procedural due process claim clearly should be reversed and remanded for trial.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant Petitioner's Petition for Writ of Certiorari, review the decision of the Fifth Circuit Court of Appeals, rendered on June 26, 1996, reverse the Judgment of the Fifth Circuit Court of Appeals, and remand this case to District Court for trial on the merits.

Respectfully submitted,

McNAMARA & McNAMARA
501 Franklin Avenue, Suite 500
Waco, Texas 76701
(817) 754-5456
(817) 753-0719 - facsimile

By: 
John B. McNamara, Jr.

Attorney for Petitioner

Supreme Court, U.S.
FILED

(2)

NO. 96 758 NOV 1 2 1996

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ELEANOR TAYLOR,
Plaintiff-Petitioner
VS.

McLENNAN COMMUNITY COLLEGE,
DR. DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
MR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
(95-50601)

APPENDIX

John B. McNamara, Jr.
Counsel of Record
LaNelle L. McNamara
McNAMARA & McNAMARA
501 Franklin Avenue, Suite 500
Waco, Texas 76701
(817) 754-5456/753-0719 (fax)

ATTORNEYS FOR PETITIONER

63 pp

TABLE OF CONTENTS

Page

ORDER/JUDGMENT 1
of the United States District Court
for the Western District of Texas,
Waco Division

JUDGMENT/OPINION 55
of the United States Court
of Appeals for the Fifth Circuit

ORDER ON PETITION FOR REHEARING 59
& SUGGESTION FOR REHEARING EN BANC
of the United States Court
of Appeals for the Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ELEANOR TAYLOR	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. W-94-CA-288**
MCLENNAN COMMUNITY	§	
COLLEGE,	§	
DENNIS MICHAELIS,	§	
DEBORAH GARRETT,	§	
RICHARD CORONADO, &	§	
MIKE JONES,	§	
Defendants.	§	

ORDER

Came on to be considered the Motions of Defendants McLennan Community College ("MCC"), Dennis Michaelis ("Michaelis"), Deborah Garrett ("Garrett"), Richard Coronado ("Coronado"), and Mike Jones ("Jones"), for Summary Judgment, and Plaintiff Eleanor Taylor's ("Taylor") responses. After careful consideration, the Court determines that Defendants' Motions are meritorious and are therefore granted.

I. Background

On February 11, 1993, Plaintiff received a letter from Defendant Michaelis terminating her employment with MCC effective March 31, 1993 and placing her on administrative leave with pay until that date. The stated reason for her termination was insubordination and inability to follow administrative procedures and directives of her superiors.

Taylor disagreed with the stated reasons for her termination. She felt that her termination was due to the exercise of her First Amendment rights, because of her race, her sex, and the fact that she filed a worker's compensation claim. Plaintiff has brought suit against the Defendants pursuant to 42 U.S.C. §§ 1981, 1983, 1985, Title VII and for the Texas based claims of intentional infliction of mental anguish and section 451.001 of the Texas Labor Code.

II. Discussion

A. Summary Judgment

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED.R.Civ.P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met its burden, the court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. See id. at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. See id. at 1031; Jones v. Western Geophysical Co., 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to graant summary judgment the court is merely dtermining whether a factual dispute exists and is not required to resolve those disputes. See Jones, 669 F.2d at 283. The fact that it appears to the Court that the non-moving party is unlikely to prevail at trail or that the movant's statement of facts appears more

plausible is not a reason to grant summary judgment. See id. at 283.

However, if the movant satisfies his initial responsibility, based on "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, " of an absence of a genuine issue of material fact, and they are entitled to judgment as matter of law, the non-movant must present sufficient summary judgment proof indicating that a material fact is in dispute or that the movant is not entitled to judgment as matter of law. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552 (1986). By imposing this requirement on the non-movant, Rule 56 isolates and disposes of factually unsupported claims and defenses. Id. at 2553. It is not a disfavored procedural shortcut, but rather "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex, 106 S.Ct. at 2555; FED.R.CIV.P. 1. Thus, summary judgment should be granted when "critical evidence is so weak or tenuous or aan essential fact that it could not support a judgment in favor of the non-movant, or where it is so overwhelming that it mandates judgment in favor of the movant." Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

In order to successfully oppose a motion for summary judgment, the non-movant must "designate specific facts showing that there is a genuine issue for trial." Nissho-Iwai American Corp. V. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988); See also, Savers Federal Sav. & Loan Ass'n v. Reetz, 888 F.2d 1497, 1501 (5th Cir. 1989); Franz Chemical Corp. v. Philadelphia Quartz, 594 F.2d 146, 150 (5th Cir. 1979); De Bardeleben v. Cummings, 453 F.2d 320, 324 (5th Cir. 1972). A non-movant does not meet his burden by merely referring to his attached deposition. Id. at 1307. The Court is under no obligation or duty to search the entire record to determine

whether a genuine issue of material fact exists. Id. Additionally, when the non-movant relies on affidavits, "it cannot rely on conclusory allegations unsupported by factual detail to create an issue of material fact." Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). Thus, as the Fifth Circuit emphasized in Topalian v. Ehrman, 954 F.2d 1125, 1137 (5th Cir.), cert. denied, 113 S.Ct. 82 (1992), "[t]he burden to discover a genuine issue of material fact is not on the [the] Court." (emphasis added).

B. Title VII: Individual Liability

Title VII provides a remedy to individuals who have been discriminated against on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000(e). However, Title VII only prohibits discrimination by "employers." 42 U.S.C. § 2000e-2. An "employer" includes any "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks . . . " Id. § 2000e-2. Individual employees of a corporation are not personally liable under Title VII. Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1129 (10th Cir. 1993). Furthermore, a Title VII suit asserted against an individual supervisor is, in reality, a suit against him in his official capacity. Sauers, 1 F.3d at 1125. Official capacity suits are suits against the entity. See generally, Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985).

Plaintiff's Title VII claims against Defendants Michaelis, Garrett, Coronado, and Jones in their individual capacity are dismissed. Title VII does not authorize suits against individual employees. In fact, Plaintiff recognizes as much,

> [p]laintiff agrees that, under existing case

> law, Plaintiff's Title VII claims cannot and should not be asserted against Defendants Dr. Dennis Michaelis, Dr. Deb Garrett, Mr. Richard Coronado, or Mr. Mike Jones in their individual capacities. Plaintiff further agrees that liability for Plaintiff's Title VII claims in this case should be limited to the College since the College, as Plaintiff's employer, is ultimately responsible for the acts of its agents under Title VII.

Plaintiff's Response to the Motion for Summary Judgment and Brief of Defendants Dennis Michaelis, Deborah Garrett, Richard Coronado and Mike Jones ("Plaintiff's Response"). Accordingly, Plaintiff's Title VII claims against Defendants Michaelis, Garrett, Coronado and Jones are dismissed.

C. Statue of Limitations

When a federal statute does not include a statute of limitations, federal courts apply the most appropriate limitations period provided by state law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Dumas v. Mt. Vernon, 612 F.2d 974, 977 (5th Cir. 1980). Claims brought pursuant to § 1983 are characterized as personal injury claims, Frazier v. Garrison I.S.D., 980 F.2d 1514, 1521 (5th Cir. 1993), as are claims based on §§ 1981 and 1985. National Ass'n of Governmental Employees v. City of Public Service Bd. of San Antonio, 40 F.3d 698, 713 n.22 (5th Cir. 1994); McDougal v. County of Imperial, 942 F. 2d 668, 673-74 (9th Cir. 1991); therefore, Texas' two year statute of limitations applies to Plaintiff's claims. Frazier, 980 F.2d at 1521.[1]

---

[1]Defendants do not appear to have raised statute of limitations as a defense to Plaintiff's Title VII claims; therefore, the Court declines to address the issue sua sponte.

However, in United Air Lines, Inc. v. Evans, the United States Supreme Court indicated that discriminatory acts that could not be used to establish a cause of action might still be admissible.

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. 553, 558 (1977). Thus, evidence of past discriminatory acts, which are not sufficient to establish an independent cause of action may provide relevant background information in determining whether a present descriminatory action occurred. Bouman v. Block, 940 F.2d 1211, 1218 (9th Cir. 1991); Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396, 402 (1st Cir. 1990).

In Cortes v. Maxus Exploration Co., 977 F.2d 195, 199 (5th Cir. 1992), the court held that evidence of time barred acts under Title VIII was admissible to show current discriminatory practice. In that case, the district court found the plaintiff had been sexually harassed and constructively discharged in March, 1986. However, the district court considered numerous instances of sexually harassing behavior that occurred between the years 1980-82. The Fifth Circuit held that ". . . the district court properly considered evidence of the 1980-82 fear producing actions in determining whether the 1986 actions amounted to sexual harassment and constructive discharge." Id. at 199. The circuit court then

cited numerous cases in which it had held that such evidence was admissible - Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir.), reh'g denied, 656 F.2d 704 (5th Cir. 19810("[w]hile some or most of this evidence may concern time-barred conduct, it is relevant, . . . and may be used. . . to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives."); Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 540 (5th Cir.), reh'g denied, 618 F.2d 1389 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981) (time-barred acts admissible to prove current conduct); Crawford v. Western Elec. Co., 614 F.2d 1300, 1314 (5th Cir.), reh'g denied, 620 F.2d 300 (5th Cir. 1980)(time barred conduct relevant to show current discriminatory practices).

Taylor filed her lawsuit on October 13, 1994. Plaintiff claims that she was terminated on March 31, 1993. Therefore, her claim for damages resulting from her termination is not time-barred.

Plaintiff also alleges that additional discriminatory actions occurred from 1987 through August, 1992. While these actions would not support an independent cause of action, both the Fifth Circuit and the United States Supreme Court have indicated that such evidence is admissible as "background evidence in a proceeding in which the status of a current practice is at issue". Because this appears to be how Plaintiff intends to use this past evidence, the Court denies Defendants' Motion for Summary Judgment based on the Statute of Limitations.

D. Conspiracy - 42 U.S.C. § 1985

Taylor asserts that the Defendants conspired to deprive her of her civil rights in violation of 42 U.S.C. § 1985. Liability under this statute may arise

> [i]f two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In order to establish a violation of § 1985, the plaintiff must allege and prove:

(1) a conspiracy;

(2) formed for the purpose of depriving another of equal privileges or immunities;

(3) an act in furtherance of the conspiracy committed or caused to be committed by a conspirator; and

(4) that she was injured in her person or property or deprived of a right or privilege as a United States Citizen.

Jones v. Adam's Mark Hotel, 840 F.Supp. 66, 68 (S.D.Tex. 1993)(citing Griffen v. Brechenridge, 403 U.S. 88, 102-03 (1971).

In order to satisfy the "conspiracy" requirement of § 1985, the plaintiff must show that the conspiracy involved two or more persons. Hillard v. Furguson, 30 F.3d 649, 653 (5th Cir. 1994). In the Fifth Circuit, it has long been the rule that "a corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." Id. at 653; Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert denied, 345 U.S. 925 (1953). Furthermore, actions taken by employees, for purposes of § 1985, are considered to have been taken by the same collective entity. Id. at 68; Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505 (6th Cir.), cert. denied, 501 U.S. 1261, 111 S.Ct. 2917, 115 L.Ed.2d 1080 (1991). Thus, in Moody v. Jefferson Parish School Bd., 803 F.Supp. 1158, 1166 (E.D.La. 1992), aff'd, 2 F.3d 604 (1993), the district court dismissed the plaintiff's § 1985 claim against the Personnel Evaluation Coordinator for the Jefferson Parish School Board, the Principal of West Jefferson High School, the Vice-Principal of the school and various teachers who allegedly conspired to deprive the plaintiff of her constitutional rights. Plaintiff had brought suit against the Defendants in both their individual and official capacities. Id. at 1160. However, the Court dismissed the plaintiff's § 1985 claim because the individual defendants and the school board could not conspire with themselves. Id. at 1167. See also, Hull, 926 F.2d at 509-10(affirming summary judgment for defendants, who were sued in both their individual and official capacities because they were members of the same collective entity); Allen v. City of Chicago, 828 F.Supp. 543, 565 (N.D.Ill. 1993)(dismissing Plaintiff's § 1985 claim against defendants sued in both their individual and official capacities).

Defendants maintains that Taylor's conspiracy claim must fail. Plaintiff apparently agrees with the Defendants' interpretation of the law. Plaintiff states

> Taylor acknowledges that MCC accurately states the law in this Circuit relating to conspiracy. . .and that the application of the law in this Circuit would prevent Taylor from pursuing a claim for conspiracy under 42 U.S.C. § 1985 for the reason that all Defendants are considered to be a single entity or "person" under the law.

Plaintiff's Response to Defendant McLennan Community College's Motion for Summary Judgment at p. 5-6. Consequently, Plaintiff's conspiracy claim is dismissed.

E. Due Process

The Due Process Clause of the Fourteenth Amendment requires notice and an opportunity to be heard before the termination of a public employee if such termination would infringe a liberty or property interest. Johnson v. Southwest Mississippi Regional Medical Center, 878 F.2d 856, 858 (5th Cir. 1989). When determining whether an employee has a liberty or property interest in continued employment, the district court must look to state law. Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed. 684 (1976). A claim of entitlement to continued employment "may be directly created by state statute or by a written contract, or by a mutually explicit understanding enforceable under state law as an implied contract." Johnson, 878 F.2d at 858.

1. Property Interest

In Texas, employees are at-will employees and may be terminated without cause. Glagola v. North Texas Mun. Water Dist., 705 F.Supp. 1220, 1221 (E.D.Tex. 1989). However, a written contract creates a legitimate claim of entitlement to an employment position. Perry v. Sindermann,

408 U.S. 593, 601-02 (1972). A college professor or staff employee dismissed during the term of his employment contract has an interest in continued employment that is safeguarded by due process. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

In her response, Plaintiff maintains that her contract with MCC creates a property interest. Plaintiff's employment contract provides the following:

> This Contract, made and entered into by and between the Board of Trustees of McLennan County Junior College District, in connection with its operation of the McLennan Community College, ("MCC") and Eleanor Taylor, ("Employee"), Witness: The MCC hereby employs the said Employee, as Coordinator of Upward Bound Program of the McLennan Community College for a period of 12 months, beginning September 1, 1992, and ending August 31, 1993, at a salary of $39,734 . . ."

Exhibit 29 Employment Contract between MCC and Taylor. Further, the contract goes on to state that the

> [e]mployee acknowledges and agrees that this contract creates no property interest of any kind beyond the period of time stated in the contract and that there is no expectation of employment, expressed or implied, beyond the expiration date of this contract.

Id. (emphasis added).

Defendants state that Plaintiff was terminated in March, 1993. Plaintiff's termination occurred before her

employment contract had expired; therefore, Plaintiff had a property interest in her employment when she was terminated.[2] However, the above language clearly indicates that Plaintiff does not have a "continued" right to employment after the expiration of her employment contract. The contract ended on August 31, 1993, and Plaintiff acknowledged that "the contract creates no property interest of any kind beyond the period of time stated in the contract," which is August 31, 1993. Therefore, Plaintiff does not have a property interest in her employment after this date.

2. Liberty Interest

In order to establish a deprivation of a liberty interest, a terminated employee must show that she was terminated, without notice and an opportunity to be heard, for a reason which was 1) false, 2) stigmatizing, and 3) published. Moore v. Mississippi Valley State University, 871 F.2d 545, 549 (5th Cir. 1989); Huffstutler v. Bergland, 607 F.2d 1090, 1092 (5th Cir. 1979), or that she was denied other employment opportunities by the state as a result of a stigmatizing termination, for which she did not receive proper notice and a name clearing hearing. Id. at 549; Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972).

Reputational injury alone does not implicate a constitutionally protected liberty interest. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 1161 (1976). Instead, the plaintiff must show that the employer's charges "rise to such a level

---

[2]An issue not addressed by either party is whether Plaintiff fails to allege a due process claim because she received all the benefits under her employment contract until it expired on August 31, 1993. See Kinsey v. Salado Independent School Dist., 950 F.2d 988, 997 (5th Cir. 1992); Cannon v. Beckville Indep. School Dist., 709 F.2d 9, 11 (5th Cir. 1983).

that they create a 'badge of infamy' which destroys the plaintiff's ability to take advantage of other employment opportunities." Evans v. Dallas, 861 F.2d 846, 851 (5th Cir. 1988). In addition, the false and stigmatizing charges must have been made public; therefore, publication does not occur when the information is known only in the workplace, i.e. is communicated only between employer and employee. Moore, 871 F.2d at 549; Cogdill v. Comal Indep. School Dist., 630 F. Supp. 47, 50 (W.D. Tex. 1985)(holding that disclosure of charges by school administrator to the school board does not constitute publication).

Plaintiff's allegations are not of such a nature that they rise to the level of creating a "badge of infamy" destroying her ability to obtain other employment. In addition, there is no evidence that any of the Defendants accused Taylor of immoral or stigmatizing conduct. Taylor provides no evidence that she was accused of immorality, dishonesty, or that her ability to seek employment was actually impaired. Instead, the only accusation Defendants apparently made against Plaintiff was that she failed to follow the College's rules and procedures, which could hardly be characterized as stigmatizing. Further, Plaintiff fails to provide any evidence that any information was communicated to individuals other than her employer. Thus, Plaintiff fails to establish the "publication" requirement needed to create a "liberty" interest.

3. Procedural Due Process

A public employee with a property interest in his current and/or continued employment has a right to procedural due process prior to and subsequent to termination. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). First, a public employee is entitled to a pre-termination hearing prior to termination. Simien v. San Antonio, 809 F.2d 255, 258 (5th Cir. 1987). The pre-

termination hearing does not have to resolve the "propriety of the discharge." Helms v. Rafter, 853 F.Supp. 897, 903 (W.D.N.C. 1994) citing Cleveland, 470 U.S. at 532. Constitutionally sufficient due process is provided when the employee receives, "'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'" Id. at 903; quoting Cleveland, 470 U.S. at 546. However, the employer is not required to provide the employee with documentary evidence supporting the employee's dismissal. The employer need only provide the dismissed employee with a sufficient descriptive explanation which enables the employee to make an intelligent response. Linton v. Frederick County Bd. of County Comm'rs, 964 F.2d 1436, 1440 (4th Cir. 1992); see also, Gniotek v. Philadelphia, 808 F.2d 241, 244 (3rd Cir. 1986), cert denied, 481 U.S. 1050 (1987); Helms, 853 F.Supp. at 903. However, when a state actor provides an administrative procedure satisfying due process requirements, and the plaintiff fails to avail himself of the procedural protections, the state cannot be held to have violated a public employee's procedural due process. Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir.), cert. denied, 459 U.S. 1017 (1982). The following cases involve procedural due process in the termination of public employees.

In Russell v. Harrison, 632 F.Supp. 1436 (N.D.Miss. 1986), aff'd without opinion, 815 F.2d 698 (1987), the Court denied plaintiffs' claims of procedural due process. On November 18, 1982, the plaintiffs received letters stating that their positions were being terminated as of December 31, 1982, because of a fiscal emergency at the University. The letter further stated that if further clarification of the matter was necessary, or assistance was needed in finding other employment, the plaintiffs should contact the President's Office. Neither plaintiff contacted the Office of the President, the faculty personnel committee, or any other forum. Id. at

1440. The district court held that while public employees with a property interest in their continued employment have a right to notice and a hearing prior to their termination, it is incumbent on the employee to request such a hearing. Id. at 1441 citing Perry, 408 U.S. at 603. When then employee is provided an opportunity for a hearing before the termination is effective, procedural due process is satisfied. Russell, 632 F.Supp. at 1441. Since the plaintiffs in this case were informed on November 18, 1982 that their termination was to become effective on December 31, 1992, they clearly had adequate time to request a hearing before the termination was effective. Id. at 1442. Their failure to request a hearing forestalls any later complaints of a denial of procedural due process. Id. at 1442.

In Faucher v. Rodziewicz, 891 F.2d 864, 867 (11th Cir. 1990), the court held that the plaintiff, an anesthestioligist, was not denied procedural due process when her services were significantly limited by the hospital. The court held that, even if the plaintiff had a protected property right, she failed to utilize the extensive internal hospital appeal procedures to contest the impairment of her anesthesiology services, and the failure to do so doomed her claim. Id. at 870.

In a case somewhat similar to the present, Correa v. Nampa School Dist., 645 F.2d 814 (9th Cir. 1981), the Ninth Circuit denied plaintiff's procedural due process claim. In that case, the plaintiff, a supervisor, filed suit against the local school district after her school contract was not renewed. The school placed her on probation in March, 1977 after she received a written evaluation of her performance. The plaintiff was subsequently informed on May 13, 1977 that her employment contract would not be renewed. The school district failed to provide any reasons for the contract's non-renewal. The court denied the plaintiff's procedural due process claim, holding that "a person cannot state a claim for

denial of procedural rights when he has elected to forego a complete hearing." Id. at 817.[3]

In a case, that reached an opposite result from the above cases, the Fifth Circuit held that the terminated public employees had not received constitutionally sufficient procedural due process. Texas Faculty Ass'n v. University of Texas, 946 F.2d 379 (5th Cir. 1991). The Court stated that

> [the] appellants twice demanded hearings of the sort provided in the Board of Regents' Rules and Regulations, the only grievance procedures of which they were aware, and that their demands were rebuffed each time. Accordingly, we hold that appellants did not waive their right to challenge the termination decisions where they actively sought to involve the procedures to which they in good faith thought themselves entitled, and were not offered a constitutionally adequate alternative. Only where a 'faculty member [] knows that the opportunity for [an adequate] hearing is available and chooses to forego

---

[3]In fact, the reason articulated by Plaintiff in this case for her failure to follow the administrative procedures set up to handle employee grievances is similar to the reasons stated by the plaintiff in Correa, frustration with the "system". Taylor: "Q: From February 11th through March 31st of 1993 -- and you were on the payroll during that whole time, are you saying there was no mechanism by which you could have challenged the decision? A: There was no mechanism by which I felt like I needed to challenge the decision. The decision was made. Yes, I could have used the procedures to do that [challenge the decision]."

Correa plaintiff: "After my confrontation with Mr. Burns and the statement that they had evidence against me, I could sense the situation and I didn't want to go for any more harassment."

> that opportunity, [do] they act at their peril.'

Texas Faculty Ass'n, 946 F.2d at 389 (emphasis added), citing Russell, 632 F.Supp. at 1442.

In the present case, Taylor admits to having knowledge of MCC's procedures to challenge administrative decisions.[4] Plaintiff admitted that, while employed at MCC, she knew that MCC had various procedures for complaining about administrative practices, Plaintiff's Deposition at p. 165, and that on at least one occasion, she was provided with a copy of the procedures. Id. Further, Plaintiff acknowledges she never filed a grievance or used the appropriate procedural mechanisms to complain about the alleged promotion loss, about the reorganization and/or classification of her position, or her termination in 1993. Id. at 165-66. In fact, Plaintiff remained on MCC's payroll from February 11, 1993 until the end of March, 1993, but she still failed to use any of the grievance procedures set up by MCC for employee complaints. Id. at 166. When asked during her deposition if she was saying that no mechanism existed for her to challenge her termination, she stated:

> A: There was no mechanism by which I felt like I needed to challenge the decision. The

---

[4]MCC has extensive administrative procedures for employees desiring to bring complaints against the University or its employees. See Exhibit C Grievance Procedures, Defendants Dennis Michaelis, Deborah Garrett, Richard Coronado and Mike Jones' Motion for Summary Judgment. In fact, the grievance procedures at MCC provide employees avenues in which to file formal and informal grievances. MCC also provides terminated employees with "due process" procedures to be followed when a tenured employee or employee whose contract has not expired is terminated. Exhibit C Academic Freedom, Responsibility and Tenure at p.6.

decision was made. Yes, I could have used the procedures to do that.

Q: And you did not?

A: No, I did not.

Finally, Plaintiff's complaint that she did not receive procedural due process because she was inadequately informed of the reasons for her termination is misplaced. In a Memorandum written by Jones and signed by Taylor on August 20, 1992, Jones advises Taylor of the many problems he was having with her. For instance, Jones indicates that Taylor fails to follow the proper chain of command when she has a problem:

> I have discussed on numerous occasions the fact that I wanted an opportunity to address any issues in your area before you contact others within the organization. If we are not able to resolve the concerns, problems, or questions on our own, then I will ensure that you will be given the opportunity to solve them at another level.

Additionally, the memo lists Plaintiff's problems with following college procedures as an area of concern,

> As stated in my correspondence of June 23, 1992, I have asked you to submit your requests, forms, and activities in a timely and orderly manner that will enable us to support our programs and to serve the college, the community, and our students in an efficient and effective manner. This means that, except for emergencies, you will need to

> comply with my memorandum of May 29, 1992, which details the deadline for turning in forms for approval. Rarely have you complied with my request to follow these procedures in the past.

Id. at p.1. Finally, Jones lists Plaintiff's failure to follow the diversification policies set by the Personnel Office at MCC as a problem that could lead to termination.

> Finally, in the past few years you have been asked to diversity your staff and your program. The ethnic composition of your staff historically has not reflected the diverse student population (specifically Hispanic) served by the program. Your lack of cooperation in this area has led to confusion for students, staff, and faculty during this summer. Beginning with the Fall Semester, we will follow established college personnel practices and work with the Personnel Office at MCC to employ a diversified staff. This will provide us with an opportunity to look at a variety of applicants well in advance of our need.

Id. at p.1. To add emphasis to the serious nature of the situation Jones states the "[f]allure to follow the directives in this memorandum are grounds for and will result in termination of your employment from MCC." Id. at p. 1-2.

On February 2, 1993, Jones submitted a letter to Garrett, the Vice President of Student Services, recommending that Plaintiff's employment be terminated. Exhibit "F" attached to Affidavit of Michael Jones. In that letter, Jones states that since Taylor was assigned to him his "authority as

a supervisor has been challenged on almost every issue," that she has "lied, harassed, threatened, terrorized and racially slurred members of our staff on numerous occasions," and "consistently disobeyed orders in following EEOC hiring guidelines, following procedures, and requests for cooperation."

In closing, Jones suggests that termination is the only alternative to take because of Plaintiff's repeated refusal to follow his directions. Finally, in a letter dated February 11, 1993, Dennis Michaelis, the President of MCC, states that

> [b]ased upon the recommendation of your supervisors, I am approving termination of your employment with McLennan Community College as of March 31, 1993. You will be relieved of your duties as Coordinator of the Upward Bound Program effective immediately and placed on administrative leave with pay. I regret that this action has to be taken, but your repeated failure to adhere to college policies and directions and your continuing acts of insubordination leave me no choice.

Plaintiff's Exhibit 29. The letter further states that "[i]n the meantime, if you have any questions, please contact Mr. Jesse Alvarez in the Personnel Office." Thus, Plaintiff had constitutionally sufficient notice of the reasons for her termination.

Finally, Plaintiff's complaint alleging a denial of procedural due process because she was not given a post-termination hearing is equally without merit. When a plaintiff fails to avail herself of administrative procedures provided by the state actor, the state cannot be held to have violated a public employee's procedural due process. Dusanek, 677 F.2d

at 543. A plaintiff cannot fail to take advantage of a state remedy and "then argue that the deprivation by the state was the inadequacy or lack of the skipped remedy." Myrick v. Dallas, 810 F.2d 1382, 1388 (5th Cir. 1987).

As stated previously, Plaintiff did not even request a post-termination hearing. Defendant maintains that Taylor has never requested a post-termination hearing, and Plaintiff does not claim to the contrary. In fact, her statements at her deposition support the Defendants' claims. Thus, Plaintiff's procedural due process claims are denied.

F. Termination for Free Speech

In order to successfully assert a § 1983 claim for retaliation based on the denial of free speech, the Plaintiff must establish 1) that the speech involves a matter of public concern; 2) that the "interests of the [employee], as a citizen, in commenting on matters of public concern [outweigh] the interests of the State, as an employer, in promoting the efficiency of the public service it performs through its employees" and 3) that the "employee's discipline was motivated by the uttered speech". Kinsey, 950 F.2d at 992 , quoting, Coughlin v. Lee, 946 F.2d 1152, 1156-57 (5th Cir. 1991); Thompson v. Starkville, 901 F. 2d 456, 460 (5th Cir. 1990); McDonald v. City of Freeport, 834 F. Supp. 921, 930 (S.D.Tex. 1993).

Under the first prong, the Court must determine whether Plaintiff's speech was a matter of public concern. The context, form, and content of a given statement, as revealed by the whole record, affect whether speech is a matter of public concern. McDonald, 834 F.Supp. at 930. Speech that discloses official impropriety or other malfeasance should generally be considered to be a matter of public concern. Connick v. Myers, 461 U.S. 138, 148, 103 S.Ct. 1684, 1691, 75

L.Ed.2d 708 (1983); Conaway v. Smith, 853 F.2d 789, 795 (10th Cir. 1988). Speech that is aimed at uncovering wrongdoing or breaches of the public trust is a matter of public concern. Glass v. Dachel, 2 F.3d 733, 741 (5th Cir. 1993).

On the other hand, speech that is of a purely personal motive or involves personal employment conditions is not protected by the First Amendment. Ayoub v. Texas A & M University, 927 F.2d 834, 837 (5th Cir. 1991), cert.denied, 502 U.S. 817 (1991); Knowlton v. Greenwood Independent School Dist., 957 F.2d 1172, 1178 (5th Cir. 1992). As the Fifth Circuit emphasized in Ayoub,

> [b]ecause almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in his role as employee. In making that determination, the mere fact that the topic of the employee's speech was one in which the public might or would have a great interest is of little moment.

Id. at 836, citing Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 n.2 (5th Cir. 1982) (holding that the plaintiff's comments were those of an employee and not of a citizen).

In the present case, Taylor cites four general areas of protected speech which she believes led to her termination. Taylor claims that she was terminated because she opposed

racial slurs and epithets that appeared in educational materials at MCC, that she participated in a general investigation into the allegations of discriminatory employment practices at MCC in 1991, that she voiced opposition to the College's refusal to hire additional instructionors for the Upward Bound Program until a Hispanic instructor had been hired, and that she was not given sufficient resources.

Her "speech" given in 1991 to the Office of Civil Rights is not a matter of public concern. While an employee's "speech" may still be a matter of public concern if it contains an element of personal interest, the employee "cannot transform a personal conflict into an issue of public concern simply by arguing that individual concerns might have been of interest to the public under different circumstances." Dodde v. Childers, 933 F.2d 271, 273 (5th Cir. 1991). Thus, when an employee's complaint centers on his employment situation and personal life rather than the public interest in being informed of the government's violation of federal law, the matter is not of public concern. Knowlton, 957 F.2d at 1178 (holding that because the employee's complaints of interference with family life and the added concern of hiring baby sitters was of equal, if not greater, concern then the school's violation of federal law, the employees' complaints involved a matter of private not public concern).

Plaintiff's own affidavit reflects that her complaints to the Civil Rights Investigator in 1991 were matters of personal concern. Plaintiff states that,

> [t]he essence of my testimony to the Office of Civil Rights was that I felt I had been discriminated against because I had not been allowed to apply for a new position that was created in a reorganization or classification that occurred in 1990 and early 1991. I did

> not file an official complaint of discrimination in connection with the 1991 incident, even though the College's Personnel Director and Affirmative Action and EEOC Officer, Richard Coronado, expressly told me that the College had violated a protected class in the manner in which they filled the position for which I had applied.

Taylor Affidavit at p.2. (emphasis added). Thus, while an employee's complaint about racial discrimination might generally be of "public concern," Plaintiff's affidavit in this case reveals that their complaints were really of personal nature. Plaintiff cannot be allowed to turn a purely personal complaint about the failure of MCC to appoint her to a particular position into a complaint of general racial discrimination. Plaintiff's discussion with the Civil Rights Officer in 1991 is not a matter of public concern.

In addition, when an employee's complaint touches on matters involving internal office policy or procedures, such matters are not of public concern. See Connick, 103 S.Ct. at 1691-92. Thus, a plaintiff's frequent complaints about university procedures, employees, and policies does not qualify as "protected speech" under the First Amendment; such "speech" is "quintessentially a matter of personal concern not protected by the constitution". Grassinger v. Welty, 818 F.Supp. 862, 871 (W.D.Pa. 1992), aff'd without opinion, 993 F.2d 224 (3rd Cir. 1993); see also, Assa'ald-Faltas v. Virginia., 738 F.Supp. 982, 986 (E.D. Va. 1989)(dismissing Plaintiff's First Amendment claim because her complaints about the appropriate medical protocol to be followed was of personal not public concern).

Plaintiff, in an attempt to allege as many facts as possible, states that she was discriminated against because she

did not receive a computer and was denied other benefits given to other programs. However Plaintiff's complaint is purely a private one involving internal office policy and procedures. Plaintiff's complaint is "quintessentially" a matter of personal not public concern. Plaintiff's complaints about the racial epithets and hiring procedures are possibly matters of public concern.

Under the second prong, the Court must determine whether the state's interest in efficient management of its operations outweigh the employee's interest in commenting upon the matters of public concern. Brawner v. Richardson, 855 F. 2d 187, 192 (5th Cir. 1988). When performing this balancing test, the court looks to such factors as 1) the likelihood that controversy and disruption will occur; 2) the possible impediment of the department's general performance; and 3) the affect on working relationships necessary to the department's proper functioning. Id. at 192. Other courts have suggested that the court examine such factors as 1) whether the employee's actions involve "public concerns"; 2) whether "close working relationships" are essential to fulfilling the employee's responsibilities; 3) the time, place and manner of the employee's activity; 4) whether the activity can be considered "hostile, abusive, or insubordinate"; and 5) whether the activity "impairs discipline by superiors or harmony among co-workers". Click v. Copeland, 970 F.2d 106, 112 (5th Cir 1992).

In the present case, MCC's interest in efficient management of its operations clearly outweigh Taylor's interest in commenting on MCC's request for her to diversity her staff. Assuming arguendo that Plaintiff was told she could not hire any Blacks or Whites until she hired an Hispanic, MCC's interest in the efficient management of its operations outweigh her interest in commenting upon matters of public concern.

Under the test established in Click, the time, place and manner of Plaintiff's complaints suggest that her complaints were personal in nature and not intended to "protect" the public interest of discrimination free work places. Based on all the documentation submitted, Plaintiff apparently never communicated her "concerns" to anyone outside MCC. If Plaintiff were truly concerned with the discriminatory effects of MCC's policy, she would have sought outside help to stop it. The Defendants have submitted memos and reports indicating their desire for Plaintiff to advertise positions available in her department in order to attract more qualified Hispanic candidates. However, Plaintiff did not submit any information that she protested the polices at the time she alleges the discrimination was occurring. In fact, a careful reading of Plaintiff's affidavit reveals the contrary. Throughout her affidavit, Plaintiff states that she was disciplined for failing to advertise her positions because she thought this was a discriminatory practice. However, Plaintiff never makes the simple statement that "I told the administration that hiring only Hispanics at the cost of qualified black and white applicants is discriminatory and should not be done." Instead, Plaintiff lists pages and pages of affidavit testimony stating that such practice was discriminatory, and she was terminated for refusing to engage in such discrimination.

Finally, Taylor's actions clearly could be considered "hostile, abusive, and insubordinate" and would "impair the discipline by superiors [and] harmony among co-workers." Because many of the facts required to analyze this prong are contained in the Court's analysis under the third prong, the Court declines to engage in an in-depth analysis of this issue here.

Under the third prong, the Plaintiff must show that her discipline was motivated by the uttered speech. Ordinarily

summary judgment is inappropriate for the issue of whether an employee's protected conduct was substantial or motivating factor in an employer's decision to take action against the employee because this issue is ordinarily a question of fact. Click, 970 F.2d at 113. See also, Wilson v. UT Health Ctr., 973 F.2d 1263, 1270 (5th Cir. 1992), cert. denied, 113 S.Ct. 1644 (1993)(reversing and remanding case to district court in order to let a jury decide whether the Plaintiff was dismissed because she exercised her freedom of speech).

However, if the defendant has shown the absence of any evidence of "causation," the plaintiff has a duty when responding to a defendant's motion for summary judgment to present the court with factual assertions that create a material issue of fact. See generally, Cleckner, 556 F.2d at 771. The plaintiff, in an retaliatory discharge case, must come forward with facts indicating that the exercising of his constitutional rights was a "substantial" or "motivating" factor in the defendant's actions. Mt. Healthy City Sch. Dist. Board of Educ. v. Doyle, 97 S.Ct. 568, 576 (1977). In federal court, the plaintiff cannot rely on mere conclusory allegations. See Gossett, 569 F.2d at 87. Instead, she is required to go beyond the pleadings, and by way of affidavits, depositions, answers to interrogatories, etc., demonstrate specific material facts that give rise to a genuine issue of material fact. Celotex, 106 S.Ct. 2551-52. A defendant cannot be held liable for violating a plaintiff's First Amendment rights if he did not know of the protected speech. Cusson-Cobb v. O'Lessker, 953 F.2d 1079, 1081 (7th Cir. 1992), see also, Caldwell v. Elwood, 959 F.2d 670, 672 (7th Cir. 1992)(affirming the district court's granting of defendant's motion to dismiss based on the plaintiff's failure to plead that the defendants knew of the protected speech that allegedly caused the discrimination). Further, a plaintiff does not establish the prerequisite "causation" merely because he was fired after filing a lawsuit. O'Connor v. Chicago Transit Authority, 985 F.2d 1362, 1370 (7th Cir.

1993). In fact, when there has been a lapse of time between the alleged "protected speech" and the adverse employment decision, the plaintiff's argument of retaliation is seriously under-cut. Id. at 1370; McClure v. Cywinski, 686 F.2d 541, 546 (7th Cir. 1982)(three and one-half months between "speech" and adverse employment decision).

In Vukadinovich v. Board of Sch. Trustees, 978 F.2d 403, 408 (7th Cir. 1992), cert. denied, 1145 S.Ct. (1993), the Seventh Circuit affirmed the district court's granting of summary judgment of the defendants where the plaintiff had alleged a violation of his first amendment rights. The Court stated that the plaintiff had not alleged a link between his 1986 comments and his discharge until more than two years later, the year he filed his lawsuit. The school renewed his contract twice after he engaged in the alleged "protected speech". Thus, the Seventh Circuit agreed with the district court's decision that no reasonable jury could conclude that the plaintiff's comments were a substantial or motivating factor in the decision to terminate his employment. Id. at 408. The court further emphasized that at least two members of the board who were sued were not members when the plaintiff engaged in the protected speech, and the defendants steadfastly maintained that the plaintiff's criticism of the board played no role in their decision to terminate his employment. Id. at 408 n.2.

In the present case, Plaintiff fails to provide any "causal connection" between her termination and her protest of the inclusion of racially derogatory terms in some of the course books used at the College. First, the time period between her "speech" and her termination shows that the "causal link" is a tenuous at best. While a lapse of time between a Plaintiff's speech and the adverse employment action is not dispositive, Plaintiff fails to provide any explanation as to why the College

would wait three years before terminating her employment.[5] Clearly, had MCC wanted to "discipline" her for protesting certain words in books used at the College, they would have done so sooner. Second, Plaintiff, in her own affidavit, indicates that the College stopped using the "offending text books" after she complained. This fact alone, instead of showing a lack of concern for racial relations, indicates a willingness on the part of MCC to maintain an equal opportunity environment.

Plaintiff also fails to show that her complaints about the lack of a computer was a "cause" for her termination. In her own affidavit, Plaintiff states

> I have no documents to substantiate my claim that I was treated differently than my white counterparts in purchasing a computer in August, 1991. I acknowledge that the President sent a memo stating that no equipment purchases would be authorized after August 10, 1992, and I acknowledge that my request for the purchase of a computer was submitted after the cut-off date."

Taylor Affidavit at p. 14-15. Realizing that such a statement does not even remotely rise to the level of discrimination, Plaintiff states that someone told her a white female in an entirely different area of the college submitted a request to purchase equipment and it was approved. Besides the obvious hearsay implications of such a statement, Plaintiff fails to state what the "equipment" was, provide summary judgment evidence of any information or documentation that the white female in fact did purchase the equipment after the cut-off date, or recognize that different departments in the college

---

[5]Plaintiff made the complaints in 1990, but she was not terminated until 1993.

may have different levels of technological needs, assuming of course that the "equipment purchased for the white female was in fact a computer.[6]

In addition to being purely personal in nature, Plaintiff fails to provide a causal connection to her termination in 1993 and her complaints to the Civil Rights Officer in 1991. First, Plaintiff again fails to explain the significant period of time between her "speech" in 1991 and her termination. Second, Plaintiff fails to provide sufficient summary judgment evidence to "put at issue" Defendants' claims that she was terminated because of her insubordination and her failure to follow MCC's procedures.

Plaintiff interprets her termination letter of February 11, 1993 as meaning that she was terminated because she was opposing the College's alleged desire to hire only an Hispanic. However, taken in conjunction with the documents filed by the Defendants, this is clearly not the case. Plaintiff seeks to turn the College's desire to have her program more accurately reflect the racial composition of her students into a claim of racial discrimination. However, MCC's summary judgment evidence indicates that the purpose was to follow EEOC guidelines and to have the staff members of MCC reflect the composition of the students. This fact is especially important in programs like Upward Bound where the purpose is to

---

[6]In passing, the Court notes that this is another example of the internal inconsistency of Plaintiff's claims. Throughout her complaint, Plaintiff asserts that she was racially and sexually discriminated against by the Defendants. The Court is unclear how the alleged granting of a "special benefits" to another female bolsters her claim that she was sexually discriminated against by the Defendants. Instead, the example cited by Plaintiff shows the inconsistency of her claims because she repeatedly flips back and forth between her discrimination claims and just "throws out" examples "hoping" that the Court will "buy into" her conclusory version of the events.

encourage students from disadvantaged backgrounds to stay in school and to realize that they can achieve success through education. By having someone of a like race serve as an instructor, the goals of the program are furthered because he serves as a role model that "someone like me" can succeed.

In his affidavit, Jones claims that he told Taylor her methods of hiring were not leading to the proper diversification of the program because one third of the students in the Upward Bound Program were Hispanic but none of the staff was Hispanic. Thus, Jones told Taylor she should diversify her staff and should advertise her vacancies so that she could attract as many applicants as possible. Additionally, the federal grant application under which the program operated required diversification in the make-up of the staff. "In regard to stated goals and timetables, the College will employ ethnic minorities and women in classified positions at the same level representation as the ethnic and sex compensation of the general population and labor force in McLennan County." Additionally, Jones says that

> Ms. Taylor refused to advertise and selected individuals of her own choosing. Ms. Taylor's problems were documented as early as 1990. In May, 1992, Ms. Taylor again submitted a list of recommendations of employees without complying with the procedures. I informed her that the positions had to be advertised. In June, 1992, however, Ms. Taylor allowed five individuals to begin performing duties, without proper authorization and over my expressed objection. As a result, the employed individuals received no pay checks for two months. During this two month period, I made numerous oral and written requests to Ms. Taylor for information concerning the employees, but she

> failed to respond. When she did respond, she stated that she did not understand what I wanted.

Exhibit 2; See also Memo Exhibit 2.A.

Garrett, Plaintiff's next level supervisor, also notes that she had problems with the Plaintiff concerning her willingness to attract Hispanics for the Upward Bound staff.

> The student population of Upward Bound was one-third white, one-third black, and one-third Hispanic. The grant submission documentation stated that the staff would mirror the student population, yet Ms. Taylor had no Hispanic employees. Although Ms. Taylor was never told to hire Hispanics at the exclusion of other more-qualified applicants, we did encourage her to go beyond the same pool of individuals that she relied on. We directed her to advertise the positions in the hope of attracting more-qualified Hispanics. My predecessor documented Ms. Taylor's failure to diversify. In May, 1992, Ms. Taylor's slate of candidates was not approved because of her failure to open the process to others. The rejection of her candidates was not based on Ms. Taylor's race or sex, but rather, was based on our sincere desire to communicate to Ms. Taylor that the administration was serious about opening up the hiring process to attract qualified candidates.

Garrett Aff. Ex. D.3.

Additionally, Jones states that "[f]rom the beginning, Ms. Taylor resisted my supervision and challenged my

authority. I perceived that she felt it beneath her to report to someone who was a director (rather than a vice president) and to report to someone who had a bachelor's degree (Ms. Taylor had a master's degree)." Defendant's Exhibit 2, Jones Affidavit. Plaintiff, in fact, does state in her own affidavit that MCC sexually discriminated against her because Jones was promoted over her although Plaintiff had a higher level of education.

According to Jones, Plaintiff's termination was also recommended because she did not follow the proper chain of command. Jones states "Ms. Taylor challenged my authority by attempting to report directly to Dr. Garrett on some matters despite my instructions to her to respect the chain of command." Exhibit 2.1 ("On three occasions we have discussed the fact that I wanted an opportunity to address any problems in our area before they were taken up the chain of command. The discussion included the importance of communicating to me through the proper administrative channels as in the college organizational chart. . .You stated that you understood my position and that we would have not problems in this area. Since that time there have been repeated violations of this directive.")

In her attached affidavit, Garrett, the Vice-President of Student Affairs, states that Plaintiff was consistently insubordinate and regularly violated the chain of authority.

> It was my perception that Ms. Taylor bypassed Mr. Jones even on routine matters. We tried to re-enforce the importance of following the chain of command. Ms. Taylor, however, was openly hostile to Mr. Jones' authority. For example, in the spring of 1992, I once called a meeting with Ms. Taylor and the Upward Bound staff. I also invited Mr. Jones as her new supervisor to the

> meeting. In the presence of her staff, Ms. Taylor told Mr. Jones to leave. On other occasions, Ms. Taylor also behaved inappropriately toward me. For example, Taylor once told me that I could not talk to her staff without her permission. As vice-president of student services, I have the authority to talk to college employees about matters within my authority.

Garrett Affidavit D Ex. 3.

In addition to failing to properly follow the chain of command, Defendants claim that Plaintiff was terminated because she failed to comply with internal rules and regulations. Jones states Plaintiff repeatedly failed to timely file required documentation. For example, Plaintiff failed to timely turn in travel authorization forms. Jones states

> Ms. Taylor left a travel authorization form under my door after 5:00 p.m. for a trip scheduled at 7:00 a.m. the next day. Without prior approval, Ms. Taylor took her personal car on the trip instead of riding the bus provided by the college; there was room on the bus for Ms. Taylor. She then requested reimbursement on this trip despite the fact it was not authorized. Two other faculty members also took their personal vehicles on this trip. Neither of these individuals requested or received reimbursement.

Exhibit 2. See also Memo Exhibit 2.A.

In an effort to get Plaintiff to comply with his directives, Jones wrote Plaintiff a memo. Jones emphasized his desire to cooperate with Plaintiff and urged her to comply

with applicable administrative procedures. Jones stated that he has previously "asked that all concerns be expressed directly to [him] before taking them to upline administrators." Jones further states that Plaintiff violated this directive when she "scheduled a meeting with Dr. Garrett to discuss concerns in her area" before talking to him directly and she "went directly to the President to ask information concerning her budget" both of which were in violation of the agreement she signed agreeing to discuss such matters with him first. Exhibit 2, E.

Finally, giving Plaintiff "one last chance," Jones wrote a memo to Plaintiff on August 10, 1992 and specified his requirements for her continued employment. In that memo, Jones states that he has, over the last three months, discussed his expectations and concerns regarding her performance with the Upward Bound Program. Jones informs her that she will be terminated if she fails to follow his directions in the future. First, Jones informed Plaintiff that she, as he had discussed on previous occasions, must discuss with him first any problems she might have with her program, and "[i]f we are not able to resolve the concerns, problems, or questions on our own, then I will ensure that you will be given the opportunity to solve them at another level." Exhibit 2, E August 10, 1992 Memo. Second, he informed Plaintiff that she must submit all requests, forms, and activities in a timely and orderly manner as detailed in his memorandum of May 29, 1992, which indicates the deadlines for turning in her forms needing prior approval. "Rarely have you complied with my request to follow these procedures." Id.

During the fall semester, Jones claims that his relationship with Plaintiff remained tense, and he met with her on several occasions. Jones states that on one occasion, Plaintiff upset his staff greatly when she called his office fourteen times in one day demanding that he immediately

locate the president and vice-president for approval of a document that she had given him at the last minute.

Based on the above actions, Jones, in February, 1993, recommended to Dr. Garrett that Plaintiff be dismissed. In his memorandum, Jones recommended that she be dismissed because of her disregard for MCC policies and her insubordination. See Ex. 2, F Memo to Garrett. Jones states that Taylor had challenged his authority "on almost every issue". Jones claims that Plaintiff "lied, harassed, threatened, terrorized and racially slurred" staff members on numerous occasions and that she "consistently used tactics to subvert, resist and delay requests from his office." Additionally, Jones points out that he has discussed his problems with her and recommended changes in her work attitude and performance, but she has refused to change her insubordinate behavior. Thus, Jones recommended that her employment be terminated. Garrett, agreeing with Jones, wrote a memorandum to President Michaelis approving Plaintiff's termination. In apparent agreement with Jones and Garrett, Michaelis wrote Plaintiff on February 11, 1993 informing her that she was terminated.

In conclusion, Plaintiff fails to provide sufficient summary judgment proof indicating that she was terminated for any constitutionally protected speech. Defendants' proof indicates the contrary. Plaintiff's First Amendment claim is dismissed.

G. Racial Discrimination: Title VII, §1981 and §1983

When faced with a claim of employment discrimination under Title VII, the essential issue in the case is whether the defendant intentionally discriminated against the Plaintiff. United States Postal Serv. Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). The burden of proving "intentional

discrimination" is at all times on the plaintiff. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Thus, it is the plaintiff's responsibility to come forth with sufficient evidence to raise an inference that the employer's conduct was racially motivated. Wilson v. Stroh Cos, 952 F.2d 942, 945 (6th Cir. 1992).[7]

A plaintiff may prove intentional discrimination either with direct or indirect (inferential) evidence. Davis v. Chevron, USA, Inc., 14 F.3d 1082, 1085 (5th Cir., 1994). Direct evidence of discrimination is the exception not the rule. Id. at 1085. Evidence of direct discrimination exists when the employer places a substantial negative reliance on an illegitimate criterion in reaching an employment decision. Id. In the context of employment discrimination cases, "[d]irect evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." Id. at 1085; Brown v. East Miss. Elec. Power Ass'n., 989 F.2d 858, 861 (5th Cir. 1993). Direct evidence of discrimination exists when a terminated employee's supervisor openly and routinely uses racial slurs, Davis, 14 F.3d at 1085, or when one partner refers to the plaintiff as "macho", another suggests that she overcompensates for being a woman, a third tells her to go to charm school, and a fourth advises her to talk more femininely, dress more femininely, and wear more jewelry. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). These comments are "direct evidence" of discrimination

---

[7]Plaintiff additionally asserts that she was discriminated against in violation of 42 U.S.C. §§1981 and 1983. The burden of proof in a §1981 case is the same as the burden of proof in a Title VII action. See Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Dooley v. Ft. Worth Independent School Dist., 686 F.Supp. 1194, 1201 (N.D.Tex. 1987), aff'd, 866 F.2d 418, cert. denied, 490 U.S. 1107 (1989). Additionally, when a section 1983 claim is used as a parallel remedy with a Title VII claim in a discrimination suit, the elements of the cause of action are treated the same under both statutes. Irby v. Sullivan, 737 F.2d 1418, 1431 (5th Cir. 1984).

because they cannot be interpreted as anything other than a reflection of bias - either racial or sexual. Davis, 14 F.3d at 1085.

If a plaintiff is unable to prove discrimination with "direct evidence", she may prove discrimination by "inference." A plaintiff may inferentially establish a claim of discrimination by following the test discussed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Burdine, 450 U.S. at 248. The test articulated in these cases sets the procedural mechanisms that gave procedural mechanisms that govern discrimination cases. Under this test: 1) the plaintiff must prove, by a preponderance of the evidence, a prima facie case of discrimination; 2) if the plaintiff is successful, the burden shifts to the defendant to articulate a non-discriminatory reason for its decision; and 3) if that is done, the plaintiff may attempt to demonstrate that the defendant's proffered reason(s) is pretextual. St. Mary's Honor Ct. v. Hicks, 113 S. Ct. 2742, 2747 (1993).

In the present action, Plaintiff alleges that she suffered both disparate treatment and was subject to retaliatory discharge. In order to prove a disparate treatment claim, the plaintiff must generally prove: 1) that she is a member of a protected class; 2) that she was qualified for the job for which she applied or from which she was discharged; 3) she was not offered the job or was discharged; and 4) she was replaced by or the position as given to a non-minority. McDaniel v. Temple Independent School Dist., 770 F.2d 1340, 1345-46 (5th Cir. 1985). See generally, Hicks, 113 St. Ct. at 2747 (disparagement *[sic]* treatment case). In order to prove a retaliatory discharge claim, the plaintiff must show: 1) she engaged in an activity protected by Title VII; 2) an adverse employment action occurred; and 3) there is a causal connection between the participation in the protected activity and the adverse employment action. McDaniel, 770 F.2d at

1346, McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983). However, both claims, disparate treatment and retaliatory discharge, require some showing of a "causal nexus" between the Plaintiff's protected status and the discriminatory action taken. Wilson, 952 F.2d at 945.

Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the action taken. Hicks, 113 S.Ct. at 2742. Therefore, the employer is not required to prove the absence of a discriminatory motive. Id. Instead, the employer need only articulate some legitimate non-discriminatory basis for its decision. Id.

If the employer satisfies this burden of production, the plaintiff may prevail only if she proves that the employer's stated reasons for her dismissal are merely a "pretext" or "ruse" designed to conceal its discriminatory motive. Davis, 14 F.3d at 1087; See also, Burdine, 450 U.S. at 255. Thus, if the defendant provides the court with sufficient summary judgment proof of a legitimate reason for not promoting or terminating her employment, the burden shifts to the plaintiff to proffer evidence that the decision was "pretextual". Davis, 14 F.2d at 1088; See also, Sample v. Schuller, Inter., Inc., 836 F.Supp. 876, 880-82 (S.D.Ga. 1993) (granting defendant's motion for summary judgment because the plaintiff failed to provide sufficient summary judgment proof that the defendant's articulated reasons for his termination were pretextual); Armstrong v. City of Dallas, 997 F.2d 62, 65 (5th Cir. 1993) (granting defendant's motion for summary judgment because plaintiff failed to produce sufficient summary judgment proof that the defendant's articulated reasons for her termination were pretextual); Aikens v. Banana Republic, 877 F.Supp. 1031, 1039 (N.D.Tex. 1995) (dismissing plaintiff's Title VII claim because she failed to establish a prima facie case). An employee's own subjective belief of racial

discrimination is insufficient to prevent the granting of summary judgment. Aikens, 877 F.Supp. at 1038 citing Little v. Republic Refining Co., 924 F.2d 93, 96 (5th Cir. 1991); Sherrod v. Sears & Roebuck Co., 785 F.2d 1312, 1316 (5th Cir. 1986); Elliott v. Group Medical & Surgical Serv. 714 F.2d F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984). Mere naked allegations or a mere scintilla of evidence cannot prevent the granting of summary judgment. Davis, 14 F.3d at 1087. In her Response to Defendant's Motion for Summary Judgment, Plaintiff fails to provide the Court with any "direct" evidence of disparate treatment or other discrimination. Thus, in order to survive Defendant's Motion for Summary Judgment, Plaintiff must prove her claims of disparate treatment and/or retaliatory discharge inferentially.

Plaintiff fails to provide the Court with sufficient summary judgment proof to establish a prima facie case for a disparate treatment claim. In order to establish a prima facie case, the plaintiff must show that she was replaced by a person who is not a member of a protected group to which the plaintiff belongs. Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592 (5th Cir. 1992); McDaniel, 770 F.2d at 1345-46. In Borris v. Hartmarx Specialty Stores, 913 F.2d 253, 255 (5th Cir. 1990), the Fifth Circuit stated that the district court correctly concluded that the plaintiff had established a prima facie case of discrimination because "[t]he evidence established that Norris [the Plaintiff] is black, that she was qualified for her job, that her employer had discharged her, and her employer replaced her with a white women *[sic]*." (emphasis added). Additionally, it is important to note that the district court had dismissed another plaintiff's claim for the failure to establish a prima facie claim. The district court held that this plaintiff could not establish a prima facie case because "she could not prove an essential element of her case--that her employer had filled her position with a non-minority". Id. at 254.

In response, Plaintiff claims that the Title VII does not require that she be replaced with someone outside her protected class. Plaintiff cites Meiri v. Dacon, 759 F.2d 989, 996 (2nd Cir. 1985), for the proposition that she does not have to prove she was replaced by someone outside her protected class. However, this case is never cited by the Fifth Circuit, and it appears that no other circuit has adopted the logic contained in this case. Every Fifth Circuit case seems to have required proof of this element in a disparate treatment claim. See Young v. Houston, 906 F.2d 1977, 180 (5th Cir. 1990); Norris, 913 F.2d at 254-55. Also, the Supreme Court in Hicks, 113 S.Ct. at 2747 stated that the defendant did not challenge the district court's finding that the plaintiff had established a prima facie case, when she proved "(1) that he was black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man." (emphasis added). Thus, the Plaintiff's reliance on the Second Circuit opinion, without any reference to either Fifth Circuit or Supreme Court cases, is unpersuasive.

Assuming, arguendo, that Plaintiff establishes claims of disparate treatment and retaliatory discharge based on race, Plaintiff fails to demonstrate that the Defendant's proffered reasons for her termination are pretextual. Defendants have clearly satisfied their burden of production by articulating non-discriminatory reasons for terminating Plaintiff's employment. See II(F): Termination for Free Speech.

Additionally, as exemplified by the extensive discussion in section II(F), Plaintiff cannot provide the Court with sufficient summary judgment evidence that the Defendants'

articulated reasons for her termination were pretextual.[8] Defendants have submitted numerous documents indicating that the Plaintiff had been insubordinate and unwilling to follow the directives of her superiors. The affidavits and written reprimands by her supervisors reveal a pattern of insubordination and hostility that eventually led to her termination.

In contrast, Plaintiff fails to satisfy her summary judgment burden by showing that the Defendants' articulated reasons are pretextual. Plaintiff's complaints about the alleged racially insensitive words in educational materials were addressed by MCC years before she was terminated. Thus, Plaintiff's claims that this incident shows that she was subject to discrimination when she was terminated is incorrect.

Additionally, Plaintiff's complaints to the Office of Civil Rights clearly could not be used to show that the Defendants' articulated reasons for her termination were pretextual. Again, Plaintiff's complaints to the Civil Rights Office occurred years before her termination. The Office of Civil Rights found that no discrimination had occurred at MCC and Plaintiff fails to provide any connection between her termination and her complaints.

Furthermore, Plaintiff's complaints concerning the allocation of resources at MCC is insufficient to show that Defendants' articulated reasons are pretextual. The evidence submitted by both the Plaintiff and the Defendants clearly reveal that such decisions were racially neutral. (See Section II(F) Free Speech section concerning the allocation of

---

[8]The Court declines to go through the same in-depth discussion provided in the Free Speech section. The discussion concerning these memos and affidavits is incorporated by reference in this section.

resources, e.g. the computer that she was not allowed to purchase).

Plaintiff's reliance on the Defendants' alleged refusal to hire additional persons for her Upward Bound Program until she sought to diversify the staff does not in any way show that the Defendants articulated reasons were pretextual. In fact, the affidavits and memos discussed in the previous section indicate that Plaintiff was told to follow the procedures so that the composition of her staff would more likely reflect the diversity of the students in the program. The federal grant MCC received for the program required that the College try to make the staff reflect the diversity of the students in the program. Based on the uncontradicted evidence submitted by the Defendants, the racial mix of the student population was one-third white, one-third black, and one-third Hispanic. However, the staff did not have a single Hispanic while the Plaintiff was in charge. Requiring the Plaintiff to "try and diversify" the program does not in any way establish that Defendants' articulated reasons for her termination were merely pretextual.

Finally, the Court notes it is instructive that the individual who appears to have been one of two important persons in the decision to terminate her employment was an African-American male. While this is not dispositive, it reflects the general conclusory and internal inconsistency of Plaintiff's allegations of discrimination. Consequently, Plaintiff's conclusory allegations are insufficient to contradict the Defendants' articulated non-discriminatory basis for her termination. Plaintiff's own "subjective belief" that she was subject to racial discrimination is insufficient to create a material dispute of fact concerning her termination.

H. Sexual Discrimination

Plaintiff alleges that, in addition to racial discrimination, the Defendants sexually discriminated against her. Plaintiff apparently bases her sexual discrimination claims on §1983 and Title VII. Plaintiff fails to provide any in-depth discussion of how she was subject to sexual discrimination; consequently, the Court likewise declines to do so. Instead, the Court relies on the two previous sections in support of its decision dismissing Plaintiff's sexual discrimination claims.[9]

While not a disparate treatment case, the Court notes that the Fifth Circuit recently recognized the inherent tension between the protection of women in the work-force and the general problems that are common to any working environment. De Angelis v. El Paso Mun. Police Officer's Assn, 51 F.3d 591 (5th Cir. 1995).

As recently recognized by the Fifth Circuit, a hostile environment claim protects women against extremely insensitive and egregious conduct in the workplace. Id. at 593. "Any lesser standard of liability, couched in terms of conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality." Id. A less onerous standard of liability which attempts to insulate women from every day insults, as if they remained models of Victorian reticence, mandates not equality

---

[9]Further, Plaintiff fails to meet her burden of establishing a prima facie case of sexual discrimination. After Plaintiff was fired, she was replaced by a female. Additionally, even if Plaintiff alleges a prima facie case, Plaintiff does not satisfy her burden of showing that the legitimate articulated reasons by the Defendants for her termination are pretextual. Most, if not all, of Plaintiff's allegations involve issues of a racial nature, e.g. the complaints concerning the books in 1991 and the diversity problems with the Upward Bound program. Plaintiff fails to point to any evidence even remotely suggesting that the Defendants used sexually related criteria when considering her termination.

but preference for women. It creates incentives for employers to bend over backward in women's favor for fear of lawsuits. Id. "Now that most American women are working outside the home, in a broad range of occupations and with ever increasing responsibility, it seems perverse to claim that they need the protection of a preferential standard." Id. (reversing and rendering judgment for the defendant police association after a jury found the defendant association liable for sexual harassment under Title VII). Thus, based on the foregoing, Plaintiff's claims of sexual discrimination are dismissed.

I. Intentional Inflection of Mental Anguish

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove that" (1) the defendant acted intentionally or recklessly; (2) the conduct was "extreme" and "outrageous;" (3) the actions of the defendant caused the Plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993); Johnson v. Merrell Dow Pharmaceuticals, Inc., 965 F.2d 31, 33 (5th Cir. 1992). In Dean v. Ford Motor Credit Co., 885 F.2d 300, 306 (5th Cir. 1989), the Fifth Circuit Court of Appeals defined extreme and outrageous conduct as follows:

> [W]here the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. . . . Generally, the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim "Outrageous."

Dean, 885 F.2d at 306 (citing Restatement (Second) of Torts §46, Comment d (1965)). Additionally, the Restatement also

provides limits on what conduct may be found to be outrageous by stating that liability "does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. . . [t]here is no occasion for the law to intervene in every case where someone's feelings are hurt." Restatement (Second) of Torts §46. Moreover, a claim for intentional infliction of emotional distress will not lie for mere "employment disputes." Johnson, 965 F.2d at 33. The court must make the initial determination of whether the defendant's conduct may "reasonably be regarded as so extreme and outrageous as to permit recovery." Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993) (quoting Restatement (Second) of Torts §46 cmt. h (1965)).

Under Texas law, an employer's mere termination of an at-will employee does not constitute extreme and outrageous conduct. Wornick, 856 S.W.2d at 732. As the Texas Supreme Court has stated:

> Termination of an employee is never pleasant, especially for the employee. But if we were to accept Casas' arguments in this case, employers would be subjected to a potential jury trial in connection with virtually every discharge and 'there would be little left of the employment-at-will doctrine.'

Id. at 736 (quoting Mendez, 844 S.W.2d at 202). Thus, an intentional infliction of emotional distress claim will not generally arise in the employment context even where the conduct was deplorable or rises to the level of illegality. Thompson v. City of Arlington, 838 F.Supp. 1137, 1154 (N.D. Tex. 1993), citing Johnson, 965 F.2d at 33; Wilson, 939 F.2d at 1145; Horton v. Montgomery Ward & Co., 827 S.W.2d 361, 369 (Tex. App.--San Antonio 1992, writ denied). In fact, in Ugalde v. W. A. McKenzie Asphalt Co., 990 F.2d 239, 243

(5th Cir. 1993), the Fifth Circuit held that a supervisor's reference to the plaintiff as a "Mexican" and a "wet back" did not rise to the level of outrageous conduct necessary to support a claim of intentional infliction of emotional distress. But see, Prunty v. Arkansas Freightways, Inc., 16 F.3d 649, 654 n. 14 (5th Cir. 1994) (holding that Plaintiff established an intentional infliction of emotional distress claim because of the acrimonious nature of the charges and the pervasiveness of the comments).

In the present case, Plaintiff's intentional infliction of emotional distress claim fails. First, MCC, in its Motion for Summary Judgment, states that Plaintiff cannot pursue an intentional infliction of emotional distress claim against it because governmental immunity bars such suits. Plaintiff concedes this point. "Taylor concedes that her claim for intentional infliction of emotional distress [against MCC] is barred by governmental immunity." Plaintiff's Reply to MCC's Motion for Summary Judgment at p. 6.

Second, Plaintiff's intentional infliction of emotional distress claim against the individual defendant also fails. First, Plaintiff has failed to provide sufficient summary judgment proof that she was terminated because of racial or sexual discrimination. Plaintiff has likewise been unable to persuade the Court that she was retaliated against for filing a worker's compensation claim. Thus, the facts in this case clearly do not rise to the level of "outrageousness". Additionally, even if Plaintiff could establish that she was terminated for any of the reasons she suggests, the facts in this case do not "go beyond all bounds of decency" so "as to be regarded as atrocious and

utterly intolerable in a civilized society." Consequently, Plaintiff's mental anguish claim is dismissed.[10]

J. Retaliation for Filing a Worker's Compensation Claim

Section §451.001 of the Texas Labor Code creates a cause of action for an employee who is terminated in retaliation for filing a worker's compensation claim. The statute provides:

> [n]o person may discharge or in any other manner discriminate against an employee because the employee filed a claim, hired a lawyer to represent [her] in a claim, instituted, or cause to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Burfield v. Brown, Moore & Flint, Inc., 51 F.3d 583, 589 (5th Cir. 1995), quoting Swearingen v. Owens-Corning Fiberglass Corp., 968 F.2d 559, 561 (5th Cir. 1992). However, the act creates liability only for "employers." §401.001(18). According to the Act, an "employer" is a "person who makes a contract for hire, employs one or more employees, and has worker's compensation insurance coverage." §401.011(18); See also Stoker v. Furr's Inc., 813 S.W.2d 719 (Tex. App.--El Paso 1991, writ denied).

The statute of limitations for a claim brought pursuant to §451.001 is two years. Thurman v. Sears, Roebuck & Co.,

---

[10]The Court is unpersuaded by Plaintiff's claim that because she was working under an employment contract,her termination is somehow more egregious than the typical employment situation. Additionally, it is indisputable that a mere "breach of contract" does not generally give rise to an intentional infliction of emotional distress claim.

952 F.2d 128 (5th Cir. 1992). The limitations period accrues on the date the employee receives unequivocal notice that she is terminated or when a reasonable person would know of the termination. Id., at 134. In Thurman, the Fifth Circuit stated that "where unequivocal notice of termination and the employee's last day of work coincides then the alleged unlawful act will be deemed to have occurred on that date." Id. at 134 (adopting the test articulated by the Third Circuit in Bonham v. Dresser Indus., 569 F.2d 187, 192 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978) (test is not entirely subjective and limitations period begins when employee knows or a reasonable person should have known that his employer has made a final decision to terminate his employment and the employee renders no further services.)

If the employee files suit before limitations runs, the employee must establish a "causal link" between the discharge and the filing of the worker's compensation claim. Burfield, 51 F.3d at 590. If the employee establishes this "causal link", the employer must rebut the allegations by showing a legitimate reason for the discharge. Investment Properties Management, Inc. v. DeMontes, 821 S.W.2d 691, 694 (Tex. App. -- El Paso 1991, no writ).

In Hughes Tool Co. v. Richards, 624 S.W.2d 598, 599 (Tex. Civ. App. -- Houston [14th] Dist. 1981, n.r.e.), the Houston Court of Appeals held that the Plaintiff had failed to establish a "causal link" between the filing of his worker's compensation claim and his termination. The court then discussed cases in which a "causal connection" had been established.

For instance Murray Corporation of Maryland v. Brooks, 600 S.W.2d 897, 901 (Tex. Civ. App. -- Tyler 1980, no writ), evidence was introduced indicating that the employee was terminated because of the increased insurance premiums

that resulted from the filing of worker's compensation claims. Testimony was given rebutting the employer's stated reasons for the employee's termination, and the only employees not called back to work after an alleged recession were the only two employees who had filed a worker's compensation claim.

In Schrader v. Artco Bell Corp., 579 S.W.2d 534, 539 (Tex. Civ. App. -- Tyler 1979, writ ref'd n.r.e.), testimony was given that the employee's foreman told him that he could not work for the company as long as an attorney represented him. Additionally, the Executive Vice-President told the employee that since the company had a worker's compensation claim with him, he could not put him back to work. Id.

Finally, as an example, the Court of Appeals, in A. J. Foyt Chevrolet, Inc. v. Jacobs, 578 S.W.2d 445, 447 (Tex. Civ. App. 1979, no writ) held that because the parts and service manager told the employee, "I would put you back to work, but I would be a dammed fool to hire you with a lawyer," and the general manager told him that he was discharged because he would not fire his lawyer. The Plaintiffs in these cases sufficiently established causation between the filing of their worker's compensation claim and their termination.

In the present case, Defendants Michaelis, Garrett, Coronado and Jones cannot be "employers". Plaintiff concedes this point. "Plaintiff agrees that her claim for retaliation for filing a worker's compensation claim is a claim solely applicable to the Defendant College, as Plaintiff's employer, and does not impose liability on the individual Defendants for this retaliation against her." Plaintiff's Response to the Motion for Summary Judgment at p. 18.

Defendant MCC states that Plaintiff's claim should be dismissed because she was "terminated" on February 11, 1993. Therefore, her cause of action accrued on this date, and her

claim is, therefore, barred by the statute of limitations. On the other hand, Plaintiff asserts that she was not terminated until March 31, 1993.

MCC maintains that Plaintiff was terminated when she was given a letter on February 11, 1993, stating that she was being placed on administrative leave with pay.

On the other hand, Plaintiff states in her affidavit that in a "meeting [with] Mr. Jesse Alvarez, the new personnel director, and Dr. Garrett [she was advised] that there had been a recommendation to terminate her employment and that [she] would be placed on administrative leave until the end of March, 1993, when [the] employment would be terminated officially." Additionally, the letter informing her of her impending termination states

> [b]ased upon the recommendation of your supervisors, I am approving termination of your employment with McLennan Community College as of March 31, 1993. You will be relieved of your duties as Coordinator of the Upward Bound Program effective immediately and placed on administrative leave with pay.

Finally, when Plaintiff filed for unemployment compensation with the Texas Employment Commission on February 14, 1993, MCC responded to her application for unemployment by stating that Plaintiff had been employed from "9/2/90 through 3/31/93", Plaintiff's Exhibit B, and that she was "considered to be on the payroll" "through 3-31-93". Plaintiff's Exhibit C.

Clearly, the facts regarding when Plaintiff was terminated are in dispute. Both sides present arguments that could persuade a reasonable trier of fact to find in their favor. However, such a factual dispute cannot be resolved in a

motion for summary judgment. Accordingly, the court will assume, arguendo, that Plaintiff was "terminated" on March 31, 1993 and her cause of action accrued on that date.

While the Defendant MCC is not entitled to summary judgment based on the running of the statute of limitations, Plaintiff's inability to establish a "causal connection" between the filing of her worker's compensation claim and her termination is fatal to her claim. In addition to presenting competent summary judgment evidence that Plaintiff was terminated for insubordination and the inability to follow the directives of her superiors, Plaintiff fails to provide any evidence on her § 451.001 claim other than the fact that she was terminated after filing a worker's compensation claim. In fact, Plaintiff's own deposition testimony reveals her inability to establish any "causal" connection. First, Plaintiff is not even sure she filed a worker's compensation claim:

> Q: Ms. Taylor when did you file a worker's compensation claim?
>
> A: When did I file one?
>
> Q: Yes. When did you file it?
>
> A: I don't know that I filed one. I filled out some papers for the institution.

MCC's Motion for Summary Judgment. Plaintiff's Deposition at p. 145. Additionally, Defense counsel asks

> Q: . . .If you had not been asked, or filed a form regarding a work-related injury, do you believe you would still be employed today at MCC?

A: I can't answer that.

Plaintiff's Deposition at p. 154. Further, Plaintiff acknowledges that she was threatened with termination months before she filed an injury form at work.

> Q: ". . .isn't it clear you have been threatened with termination on several occasions more than six months before you ever filed a work-related -- work-related injury form at work?
>
> A: That is correct. un-huh.

Next, in an effort to get Plaintiff to state why she believes she was terminated for filing a worker's compensation claim. Defendant's attorney asks

> Q: Other than the fact that your termination came after you filed that claim for worker's comp, in terms of the timing -- other than one event happening after the other, what evidence do you have that the institution was motivated by your having filed a worker's compensation claim?
>
> A. I can't answer that. I don't know what their motivation was.
>
> Q. You don't know what their motivation was?
>
> A. Well --
>
> Q. that was your answer, correct?

A. I can't -- I can't pin their motivation down. It was a combination of things.

Plaintiff's deposition at p. 154-55.

Finally, Plaintiff's worker's compensation claim arose out of an incident where she and other co-workers inhaled fumes at MCC on January 4, 1993. In addition to Plaintiff, other co-workers reported similar injuries and they filed reports. These individuals were not fired. Plaintiff's Deposition at p. 154-55. In fact, one such individual replaced Plaintiff as the new Upward Bound Coordinator. Thus, based on the foregoing, Plaintiff's §451.001 is dismissed.

In conclusion, Plaintiff's claims pursuant to 42 U.S.C. §1981, 1983 and 1985 are dismissed. Additionally, Plaintiff's sexual and racial discrimination claims pursuant to Title VII are dismissed as are her state based claims of intentional infliction of mental anguish and her worker's compensation retaliation claim. Accordingly, it is

ORDERED that Defendants' McLennan Community College ("MCC"), Dennis Michaelis ("Michaelis"), Deborah Garrett ("Garrett"), Richard Coronado ("Coronado"), and Mike Jones ("Jones"), Motions for Summary Judgment are **GRANTED**. It is further

ORDERED that this case is **DISMISSED**.

SIGNED this 7th day of July, 1996.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50601

D.C. Docket No. W-94-CV-288

ELEANOR TAYLOR
Plaintiff - Appellant

v.

MCLENNAN COMMUNITY COLLEGE,
DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
DR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants - Appellees

Appeals from the United States District Court for the Western District of Texas, Waco

Before BENAVIDES, STEWART, AND DENNIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: August 27, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50601

ELEANOR TAYLOR Plaintiff-Appellant,

versus

MCLENNAN COMMUNITY COLLEGE,
DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
DR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas, Waco
(W-94-CV-288)

Before BENAVIDES, STEWART AND DENNIS, Circuit Judges.

PER CURIAM**********

Plaintiff-Appellant Eleanor Taylor ("Taylor") appeals the district court's grant of Defendants-Appellees' motions for summary judgment and dismissal of Taylor's claims pursuant

---

**********Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local rule 47.5.4.

to 42 U.S.C. §§ 1981, 1983, 1985, Title VII, and Texas state claims of intentional infliction of mental anguish and section 451.001 of the Texas Labor Code. After considering the parties' briefs and argument, and after reviewing the record on appeal, we affirm substantially on the basis of the district court's thorough and well-documented findings of fact and conclusions of law.

Specifically, we find that summary judgment is appropriate for the following reasons:

1. Race Discrimination and Retaliation: Taylor fails to demonstrate that Defendants-Appellees' proffered reasons for her termination are pretextual.

2. Sex Discrimination: Taylor fails to establish a *prima facie* case because she was replaced by another female, and she fails to show that Defendants-Appellees' articulated reasons for her termination are pretextual.

3. First Amendment Free Speech: Taylor's complaints were not of "public concern," but were personal in nature and not intended to protect the public interest of discrimination free work places. Moreover, Taylor's speech interest is outweighed by Defendants-Appellees' interest in efficient management. Finally, Taylor fails to establish a causal connection between her termination and her speech.

4. Due Process: Taylor fails to establish a liberty interest because her allegations do not rise to the level of creating a "badge of infamy," which would destroy her ability to obtain other employment. Furthermore, the evidence establishes that Taylor received sufficient notice of the reasons for her termination, and that she did not request a post-termination hearing.

5. Workers' Compensation: Taylor fails to demonstrate a causal link between her filing of a workers' compensation claim for inhalation of toxic fumes and her termination. Several other employees filed claims for the same incident and were not terminated.

6. Intentional Infliction of Emotional Distress: Taylor's allegations are not "extreme and outrageous," for they occurred entirely within a normal employment dispute. Thus, Taylor failed to prove an element of intentional infliction of emotional distress under Texas law.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50601

ELEANOR TAYLOR
Plaintiff - Appellant

v.

MCLENNAN COMMUNITY COLLEGE,
DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
DR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants - Appellees

Appeals from the United States District Court for the
Western District of Texas, Waco

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 6/26/96, 5 Cir., F.3d)
(August 13, 1996)

Before BENAVIDES, STEWART AND DENNIS, Circuit Judges.

PER CURIAM:

(/S/ X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Fortunato P. Benavides
United States Circuit Judge

CLERK'S NOTE
SEE FRAP AND
LOCAL RULES 41
FOR SAY OF THE
MANDATE.

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

(3)

No. 96-758

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ELEANOR TAYLOR

Petitioner,

vs.

McLENNAN COMMUNITY COLLEGE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Ronald Scott*
Lisa A. Brown

Bracewell & Patterson, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900
(713) 221-1212 - Telecopier

**Counsel of Record* *Attorneys for Respondents*

30 pp

QUESTION PRESENTED

Was summary judgment properly granted against the Petitioner on her retaliation and due process claims where competent evidence established that (1) the Petitioner was confrontational in her dealings with her supervisors and failed to follow rules and directives on a variety of matters ranging from travel authorization to hiring procedures; (2) the Petitioner failed to raise a genuine issue of material fact showing that the reasons given for her termination were pretextual; and (3) the Petitioner testified that she knowingly chose not to invoke her employer's grievance procedures to challenge the termination?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

SUMMARY 1

STATEMENT OF THE CASE 2

Proceedings Below 2
Statement of Facts 3

REASONS WHY THE PETITION SHOULD BE DENIED 12

A. *Standard of Review* 12

B. Petitioner's Title VII retaliation claim: *The Petitioner failed to raise a genuine issue of material fact showing that the College's reasons for her termination were pretextual* 12

C. Petitioner's First Amendment Claim: *The Petitioner failed to raise a genuine issue of material fact tending to show that, but for her allegedly protected speech, she would not have been terminated* 16

D. Petitioner's due process claim:
The Fifth Circuit's disposition of Petitioner's due process claim is consistent with this Court's prior decisions and raises no significant issue of constitutional law 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) 12

Cleveland Board of Education v. Loudermill, 470 U.S. 550, 105 S. Ct. 1487 (1985) 21

Collins v. City of Harker Heights, Texas, 503 U.S. 115, 112 S. Ct.1061 (1992) 20

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684 (1983) 16, 17, 19

Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991) 18

Dodds v. Childers, 933 F.2d 271 (5th Cir. 1991) 17

Dusgnek v. Hannon, 677 F.2d 538 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982) 20

Holt v. KMI-Continental, 95 F.3d 123 (2nd Cir. 1996) .. 13

Hopwood v. State of Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996) 15, 16

Maness v. Star-Kist Foods Inc., 7 F.3d 704 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2678 (1993) 13

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976) 20

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986) 12

Moyo v. Gomez, 40 F.3d 982 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 732 (1995) 14, 15

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977) 13, 18

Myrick v. Dallas, 810 F.2d 1382 (5th Cir. 1987); 21

Pierce v. Texas Dept. of Criminal Justice, 37 F.3d 1146 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1957 (1995) 14

Purkett v. Elam, 115 S. Ct. 1769 (1995) 13

Ray v. Tandem Computers, Inc., 63 F.3d 429 (5th Cir. 1995) 14

Russell v. Harrison, 632 F. Supp. 1436 (N.D. Miss. 1986), *aff'd*, 815 F.2d 698 (5th Cir. 1987) 21

Samuelson v. Durkee/French/Airwick, 976 F.2d 1111 (7th Cir. 1992) 14

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) 13, 14

Tanca v. Nordberg, 98 F.3d 680 (1st Cir. 1996) 13, 14

Valdez v. Mercy Hospital, 961 F.2d 1401 (8th Cir. 1992) 14

Waters v. Churchill, 114 S. Ct. 1878 (1994) 18, 19

STATUTES

42 U.S.C. § 1981 2

42 U.S.C. § 1983 2

42 U.S.C.A. § 2000e-3(a) (West 1995) 13

No. 96-758

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ELEANOR TAYLOR,

Petitioner,

vs.

McLENNAN COMMUNITY COLLEGE, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, McLennan Community College, Dennis Michaelis, Deborah Garrett, Richard Coronado, and Mike Jones respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's decision in this case. The decision of the Fifth Circuit is unreported and, under local Fifth Circuit rules, may not be cited as precedent.

SUMMARY

The Petition should be denied. This case involves the application of well settled rules of law to a particular set of facts. In an attempt to elevate this case into one worthy of review, Petitioner has disregarded large portions of the record and has ignored case law concerning the burden of proof in employment actions. This case ultimately turns on the routine application of Rule 56 of the Federal Rules of Civil Procedure, not on important issues of federal law. In the end, Petitioner merely is asking the Court to provide yet another level of appellate review to the district court's determination that Petitioner had failed to raise a genuine issue of material fact on essential elements of her claims.

The summary judgment evidence shows that, after her original supervisor retired, the Petitioner was confrontational with her new supervisors and was insubordinate on numerous occasions with regard to a variety of internal operating procedures. She violated college policy regarding fundraising on campus, disregarded rules for travel authorization, bypassed her direct supervisor on certain issues, submitted paperwork in an untimely manner, failed to follow college policy that required her to obtain the approval of the college president before hiring new personnel, and refused to use a competitive process to select candidates for her program, relying instead on word-of-mouth recruiting, which had a disparate impact on Hispanic individuals. This type of conduct eventually led to her termination. In the courts below, the Petitioner failed to raise a genuine issue of material fact indicating that the reason given for her discharge was pretextual or that any allegedly protected activity was a substantial or motivating cause of the discharge. In short, one may dispose of this case without reaching Petitioner's Questions Presented.

With regard to the Petitioner's due process claim, the evidence established that the Petitioner received notice of the charges; the gist of her complaint below was that she disagreed with the quality of the reasons that were given. The Petitioner also had an opportunity to contest her termination; she simply chose not to take advantage of it. The Petitioner admitted at her deposition that she had a copy of the College's grievance procedures but chose not to invoke them.

In short, the Petitioner merely disagrees with the specific application of the law to her own unique set of facts. The Petitioner offers no compelling basis for review of the decision below.

STATEMENT OF THE CASE

Proceedings Below

The Petitioner, Eleanor Taylor, filed suit on October 13, 1994 alleging that she was wrongfully terminated by her employer, McLennan Community College (MCC). Taylor asserted seven causes of action against the defendants following her termination. (R. 1-23).[1] She alleged that she was terminated because she is black and because she is female. She asserted discrimination claims under Title VII of the Civil Rights Act of 1964, the Equal Protection Clause pursuant to 42 U.S.C. § 1983, and 42 U.S.C. §§ 1981 and 1985. Taylor also alleged that she was retaliated against for having engaged in speech protected by Title VII and the First Amendment and that her termination was implemented without due process of law. Taylor alleged that she was discharged in retaliation for having filed a claim for workers' compensation benefits.

---

[1]References to the Record are designated as "(R.__)."

Finally, she asserted a claim for intentional infliction of emotional distress under state law.

The Respondents Michaelis, Garrett, Coronado, and Jones moved for summary judgment on February 27, 1995, and MCC moved for summary judgment on May 22, 1995. (R. 103-269; 410-701). Taylor responded to the motions, and the Respondents replied. (R. 722-1454; 329-405).

The district court issued an extensive and thoughtful summary judgment opinion and order dismissing the Taylor's claims. (R. 1463-1520). Taylor filed a motion for new trial and a notice of appeal. (R. 1535). The district court denied the motion for new trial on August 16, 1995, and Taylor filed an amended notice of appeal. (R. 1563). The Fifth Circuit heard oral argument and rendered a written per curiam opinion on June 26, 1996. Taylor filed a petition for rehearing and a suggestion for rehearing en banc, both of which were denied. The decision of the Fifth Circuit is unpublished and, under local court rules, may not be cited as precedent. The district court decision also is unreported.

Statement of Facts

The Petition omits several important facts that are essential to understanding why the Petitioner was terminated and why this case is not worthy of review by the Court. Accordingly, the Respondents provide their own statement of the material facts as follows:

McLennan Community College (MCC) is a two-year college located in Waco, Texas. The Petitioner, Eleanor Taylor, was employed by MCC from 1980 until 1993. (R. 1191-1192). During the period relevant to this lawsuit, Taylor served as coordinator of Upward Bound, a federally-funded program that prepares disadvantaged high school students for college. (R. 1191-1192). At the beginning of the 1990-91

school year, Taylor reported to Dr. LaVerne Wong, vice president of student services. Dr. Dennis Michaelis, president of MCC, was concerned that too many individuals reported directly to Dr. Wong, and the student services area was restructured. (R. 424). Afterward, Taylor began reporting to Dr. Marylea Henderson, director of special services, who in turn reported to Dr. Wong. (R. 424). Taylor had acknowledged personality conflicts with Dr. Henderson. (R. 591).

Taylor, who is black, implies in the Petition that the assignment of Dr. Henderson, who is white, was racially discriminatory. At her deposition, however, Taylor admitted that she does not believe that this decision was racially motivated. (R. 621).

In August 1991, Dr. Wong retired and was replaced by Dr. Deborah Garrett, who was new to MCC, but had been the chief student services officer at her previous employer. (R. 593). Taylor had applied for Dr. Garrett's position, but was not selected. (R. 593). Unlike Dr. Wong, Dr. Garrett and Dr. Henderson, Taylor did not have a doctorate. (R. 1194).

Under Dr. Garrett's leadership, additional organizational changes in the student services division were made in the spring of 1992. (R. 500-507). Mike Jones, who is black, became Taylor's direct supervisor. (R. 424). His original title was director of admissions advising; after the reorganization, the position was renamed director of student and community relations, but no pay increase occurred. (R. 527). Because Jones' area was student recruitment and high school relations, Dr. Garrett concluded that it was logical for the Upward Bound program to be under his supervision. (R. 551). Taylor, who held a master's degree and once reported directly to the vice president, was insulted that she would have to report to Jones, a mere director who held only a bachelor's degree. (R. 527).

The record shows that the relationship between Taylor and her new supervisor, Jones, quickly became strained. A recurring issue was timeliness of paperwork. In one instance, Taylor left a travel request form after 5 p.m. for a trip scheduled to leave at 7 a.m. the next morning. Without prior approval, Taylor proceeded to take her personal car on the trip instead of riding the college-provided bus. She then requested reimbursement for the trip even though her personal car trip had not been authorized. (R. 662). On another occasion, her MCC corporate American Express card was canceled because she did not pay the bill on time. (R. 663).

Taylor resisted Jones' authority by refusing to meet with him when requested and by going over his head concerning the Upward Bound budget and other paperwork. (R. 527; 552; 659-660). On one occasion, when Dr. Garrett called a meeting with Taylor, Jones, and the Upward Bound staff, Taylor ordered Jones to leave the meeting because, in Taylor's opinion, the meeting did not concern him. Taylor also told Dr. Garrett that she could not talk to Upward Bound staff without her permission. (R. 552).

At her deposition, Taylor admitted violating a MCC policy that prohibited supervisors from on-campus solicitation of funds for off-campus groups. (R. 590). Taylor had solicited funds from staff and students, and a student's parent had complained. (R. 580-581; 585-590; 667). The college had to seek legal counsel to determine if Taylor's misconduct violated any laws. (R. 587). A meeting was held with Taylor to discuss her admitted violation. (R. 583). Rather than accept the situation for what it was, she decided this meeting was evidence of discrimination against her. (R. 582-583).

Taylor told her supervisors that she worked for the federal government and not MCC, and, therefore, was not obligated to comply with MCC procedures. (R. 529). College

officials were concerned enough to call and to visit in person with a representative of the U.S. Department of Education to determine whether Upward Bound was exempt from following MCC procedures. (R. 529). The officials were told that the program was not exempt and that Taylor was strictly an employee of the College. (R. 529).

The Upward Bound program served an equal mix of white, African-American, and Hispanic high school students. (R. 528; 552). The full-time staff for the program was entirely African-American. (R. 528). The part-time instructional staff was African-American and white. (R. 510; 528). At the time in question, Upward Bound had not employed a Hispanic instructor in six years. Taylor testified that the grant submission that she prepared encouraged the program staff to mirror the student population. (R. 744, Vol. 4, p. 133). The grant submission also stated that MCC would employ ethnic minorities and women at the same level of representation as the ethnic and gender composition of the labor force in the county and that MCC would advertise vacancies. (R. 528). MCC's affirmative action plan stated that, in programs with a deficient number of minorities, open recruiting and open posting will occur.[2] (R. 429-479). The affirmative action plan is a component of a statewide desegregation plan approved by the U.S. Office of Civil Rights. (R. 423, exhibit I).

The Petition correctly notes that one of the administration's concerns with Upward Bound was the absence of Hispanic instructors, but the Petition mischaracterizes the reasons for the College's concern. The College was concerned that Taylor used informal hiring procedures and obtained her

---

[2]Contrary to the Petition, not a single passage in the MCC affirmative action plan imposes any racial preferences in hiring. (R. 423 exhibit B).

staff by word of mouth. (R. 607). According to Dr. Garrett's affidavit, the administration encouraged Taylor "to go beyond the same pool of individuals that she relied upon. We directed her to advertise in the hope of attracting qualified Hispanics." (R. 552). The goal was not to institute a racial preference or quota but to open up the selection process. (R. 552).

The Upward Bound self-study prepared by Taylor in 1990 expressly stated that the program would publicize all full-time and part-time positions throughout the city and state. (R. 744, Vol. 4, p. 137). Taylor admitted at her deposition that she had never used a competitive process to select Upward Bound instructors. (R. 744, vol. 4, pages 133-134).

A related issue was Taylor's failure to obtain the proper approval before hiring people. Taylor admitted that she had no authority to hire or fire subordinates. (R. 617). She conceded that all recommendations must go to the college president. Nonetheless, in 1990, before this dispute ever arose, Taylor "hired" instructors without seeking presidential approval. She turned in her "recommendations" *after* the individuals had begun working. As a result, Taylor's supervisor, Dr. Wong, was chastised by the college president who was concerned that the instructors had worked "for two weeks before I even saw them [employment forms]." (R. 510). His memo also expressed the concern that Taylor's selection method was unsuccessful in attracting Hispanic candidates: "I have signed the Employment Recommendation forms because I understand the need to get these folks in the classroom, but I do feel we must make every attempt in the future to see that broader ethnic representation be accomplished." (R. 510). Taylor admitted at her deposition that she failed to obtain presidential approval for her summer employment recommendations and that she was told by Dr. Wong to improve her recruiting efforts to attract Hispanic candidates. (R. 744, Vol. 4, p. 126-27).

In September 1991, Dr. Wong retired and was replaced by Dr. Garrett. Taylor continued to submit employment recommendations without having engaged in open recruiting. In May 1992, Taylor turned in her summer recommendations on the eve of commencement of the program. This time, Taylor's hand-picked slate of candidates was rejected, and Taylor was told that all of the positions would have to be advertised.[3] Taylor's original response to these directives was that she did not know that the positions should be advertised. Taylor did not characterize the advertising plan as "discriminatory" until a July 1992 memo, after Jones had warned her that her job might be in jeopardy. In this same memo, Taylor complained that "control" over employment "has been taken away from me." (R. 1210 exhibit 25 p. 11).

Although the rejection of Taylor's slate of candidates delayed commencement of the program, the delay was authorized by the U.S. Department of Education. (Garrett depo. at 129; Jones depo. at 228.) Despite the rejection of her recommendations, Taylor allowed five people she had "hired" to commence working. Because their employment had not been authorized by the college president, the employees were not paid until several months after the fact. (R. 529).

Jones objected to Taylor's "hiring" and wrote several memoranda expressing his dissatisfaction with her handling of the situation. He made several oral and written requests for information on the "volunteers" that Taylor had hired without authorization. (R. 535; 537; 541-542). Taylor alternately failed to respond, feigned ignorance, or responded by

---

[3]The Petitioner suggests that the candidates she recommended were "continuing." At least two had not worked at the College during the previous year. (R. 1210 exhibit 2). Furthermore, none had any contractual entitlement to employment as a summer instructor. *Id.*

demanding that her supervisor provide a "written memo with a detailed explanation." (R. 536; 424; 509-510; 528-529; 602; 606). Taylor admitted that she employed the instructors without the required approval of the college president. (R. 603). On this issue, as with others, Taylor simply would not accept the established lines of authority.

In June 1992, Jones met with Taylor and wrote a memo to her concerning the chain of command, timely submission of program materials, cooperation, and hiring procedures. (R. 532). Taylor was warned that, if her performance did not improve, she would be terminated. (R. 532). She responded with a 13-page letter by certified mail. Taylor received other memoranda from Jones on July 14, 1992 and August 10, 1992 concerning the chain of command, timeliness of paperwork, communication, and recruiting. (R. 542, 546-547). Taylor made no assurances that her conduct would improve. (R. 1384-1396). Instead, Taylor would question Jones' abilities and place the blame for any problems on him. (R. 536; 543-545; 1384-1396). Memoranda over arguably mundane matters fill the record and demonstrate the strained relationship between Taylor and Jones.

Taylor's own affidavit acknowledges a communication problem. According to Taylor's affidavit, Jones allegedly told Taylor on June 24, 1992 that the college president said "'My priority right now is to pretty much follow the letter of the law and that means if we are going to advertise, we're going to advertise all these positions...'" Taylor allegedly responded: "Well, why didn't you call me and tell me well let's go back to square one this is not working... this would ease a lot of the tension and the misconceptions about what may be going on.... *It would not leave it to the mind to imagine. This is what I'm saying I mean we need to communicate.*" (R. 1210, exhibit 31; emphasis added). Jones' memo on August 10, 1992,

acknowledged that there had been "confusion" and that, henceforth, "we will follow established college personnel practices and work with the Personnel Office at MCC to employ diversified staff. This will provide us with an opportunity to look at a variety of applicants well in advance of our need." In Taylor's affidavit, she admitted that she was disciplined "because I did not advertise my part-time instruction positions in the Upward Bound Program." (R. 1194).

The positions eventually were advertised, but no qualified Hispanics applied. (R. 560A). Although no Hispanic was hired, the administration was satisfied that a good faith recruitment effort had been made. (R. 560A).

Taylor's willingness to distort certain facts is demonstrated by her statement in her first amended complaint that she was excluded from the staff selection process in the fall of 1992. (R. 9). At her deposition, she admitted that this allegation is a "half-truth" because she in fact was involved in the selection process. (R. 611-612).

In September 1992, Taylor signed a new employment contract for the term September 1, 1992 through August 31, 1993. (R. 551 exhibit A).

During the fall of 1992, Taylor's attitude toward Jones remained hostile. (R. 527-530; 1191-1217). On one occasion, she repeatedly called Jones' office over and over in a single day to find out the status of paperwork that had been submitted late for approval. (R. 530). On another occasion, Taylor dodged a meeting with Jones by announcing that she had just received an important telephone call from the Department of Education; Jones later learned from the department that the phone call had been pre-arranged. (R. 529).

In December 1992, Upward Bound was audited. (R. 498; 552). That month, Taylor, Jones, and the College internal

auditor met to talk about Upward Bound. Taylor admits that communication problems between Jones and Taylor was one of the key issues discussed with the auditor. (R. 578-579).

In December 1992, the same month as the audit, Taylor filed a charge of discrimination with the Equal Employment Opportunity Commission. (R. 1399-1404). On January 25, 1993, the College received a "blind" charge stating that an unnamed employee had filed a complaint. (R. 560A). None of the individual defendants knew that Taylor had filed a charge. (R. 452; 530; 553; 560A; 622-623).

In January 1993, during a building construction project, some toxic fumes allegedly were released. Jones testified that Taylor, in his opinion, had unnecessarily exposed her staff to risk of harm by ignoring his directive to leave the premises. (R. 549).

On February 2, 1993, Jones wrote a two-page memorandum to Dr. Garrett recommending Taylor's termination. He asserted that she had "made it a practice of being difficult if not impossible to work with," that she had repeatedly challenged his authority as her supervisor, and that she had been negative and hostile toward him and others. He noted that she had disobeyed directives concerning EEO hiring guidelines and that she had subjected her staff to possibly toxic fumes by refusing a directive to leave the premises. (R. 548-549). On February 11, 1993, Taylor was called into a meeting with Dr. Garrett and the personnel director. (R. 553). They advised Taylor that she was being terminated but would remain on the payroll until March 31, 1993. Taylor was informed that her termination was the result of her "repeated failure to adhere to college policies and directives and [her] continuing acts of insubordination." (R. 512).

Although Taylor remained on the payroll for nearly two more months, she never invoked any of the College's grievance

procedures. (R. 553; 626). (R. 481-483). Taylor testified in her deposition that she had an actual copy of these procedures but chose not to use them. (R. 624; 626). In July 1994, the EEOC determined that Taylor had *not* been subjected to any unlawful retaliation or discrimination. (R. 514-516). Taylor was later replaced by another African-American female, Brenda Wilkinson. (R. 1415-1417).

REASONS WHY THE PETITION SHOULD BE DENIED

A. *Standard of Review*

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Although a court must give the party opposing summary judgment the benefit of all reasonably drawn inferences, this Court has stated that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986).

B. Petitioner's Title VII retaliation claim:

The Petitioner failed to raise a genuine issue of material fact showing that the College's reasons for her termination were pretextual.

The Fifth Circuit affirmed the summary judgment against Petitioner because she failed to demonstrate that the College's "proferred reasons for her termination are

pretextual." (Petitioner's App. at 57.) Rather than address this issue, Petitioner engages in a lengthy discussion about whether her conduct was protected by Title VII. Petitioner's discussion is irrelevant. Even if an employee engages in a protected activity, an employer will not be held liable if the employee would have been discharged even in the absence of the protected activity. *Tanca v. Nordberg*, 98 F.3d 680, 681, 685 (1st Cir. 1996); *Maness v. Star-Kist Foods Inc.*, 7 F.3d 704, 707-08 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2678 (1993); *see also Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977).

A *prima facie* case of retaliation requires proof of (1) participation in an activity protected by Title VII; (2) an adverse employment action; and (3) a causal connection between the protected conduct and the adverse employment action. 42 U.S.C.A. § 2000e-3(a) (West 1995); *Holt v. KMI-Continental*, 95 F.3d 123, 130 (2nd Cir. 1996). Establishing a *prima facie* case creates an inference of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 2747 (1993). The burden then shifts to the employer to rebut the inference of discrimination by demonstrating a legitimate, nondiscriminatory reason for the action taken. The employer's burden is one only of production; it is not required to prove the *absence* of a discriminatory motive. 113 S.Ct. at 2747; *Holt*, 95 F.3d at 130. The burden of persuasion always remains with the plaintiff. 113 S.Ct. at 2747; *see also Purkett v. Elam*, 115 S.Ct. 1769, 1771 (1995) (burden of persuasion "never shifts" from the party alleging discrimination).

Once the employer has shown a legitimate, non-retaliatory reason, any presumption of discrimination disappears. *St. Mary's*, 113 S.Ct. at 2747 and 2749. The plaintiff then must demonstrate that the defendant's stated reason is pretextual and that, but for the protected activity, she

would have suffered no adverse employment action. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429 (5th Cir. 1995); *Tanca*, 98 F.3d at 681, 685. The plaintiff ultimately must show that the reasons stated by the defendants are false and that discrimination was the real reason for her discharge. *St. Mary's*, 113 S.Ct. at 2749, 2751. Although the burden-shifting approach of *St. Mary's* and its predecessors is controlling, Taylor's Petition ignores it.

The Respondents presented a legitimate non-discriminatory reason for her termination: Taylor's lack of cooperation and refusal to follow directives or rules concerning numerous different matters. The burden shifted back to Taylor to establish that, but for some protected conduct, she would not have been terminated. *See Tanca*, 98 F.3d at 681, 685; *Pierce v. Texas Dept. of Criminal Justice*, 37 F.3d 1146, 1151 (5th Cir. 1994), *cert. denied,* 115 S. Ct. 1957 (1995); *see also St. Mary's*, 113 S.Ct. at 2749, 2751. The lower courts considered all of the summary judgment evidence and determined that Taylor had failed to raise a genuine issue of material fact on this element. The delay between Taylor's allegedly protected activity (July 1992) and her termination (February 1993) further discounted her argument of any causal connection between a protected activity and her discharge. *Cf. Valdez v. Mercy Hospital*, 961 F.2d 1401, 1403 (8th Cir. 1992) (no causal connection established where discharge occurred six months after protected activity); *Samuelson v. Durkee/French/Airwick*, 976 F.2d 1111, 1114-1115 (7th Cir. 1992) (time lapse between protected activity and adverse action discounted any causal connection).

In a last ditch effort to present this case as worthy of review, Taylor argues that the unreported decision below conflicts with a reported Ninth Circuit decision, *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994), *cert. denied*, 115

S.Ct. 732 (1995). Interestingly, Taylor never cited *Moyo* in the court below in her principal brief or reply brief. Indeed, her argument below focused primarily on causation, not whether her activity was protected by Title VII. (Appellant's Fifth Circuit Brief at 45-46.) *Moyo* involved a prison guard who was terminated allegedly for opposing a prison practice that gave white inmates who worked in the prison preferential treatment over black inmates. The district court had dismissed the complaint under Rule 12(b)(6) for failure to state a claim, apparently on the ground that prison inmates are not "employees" for purposes of Title VII. The court of appeals reversed, holding that a person states a claim if he opposes a practice that he "reasonably believes" to be unlawful, even if it in fact was not unlawful. Although *Moyo* does state that opposition may include a refusal to perform an act, the decision below does not conflict with *Moyo*. The Fifth Circuit concluded that Taylor had failed to raise a genuine issue of material fact on the element of pretext, an issue not even addressed in *Moyo*. An additional distinction is that Mr. Moyo's case had been dismissed on the pleadings, unlike the case below, which was based on an extensive summary judgment record.

Taylor also asserts that the Fifth Circuit decision below conflicts with another decision of the Fifth Circuit, *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S.Ct. 2580 (1996). Taylor's argument does not justify review by this Court. First, it is the duty of the Fifth Circuit to maintain uniformity of the decisions from that circuit. Taylor sought--and was denied--*en banc* review of the panel decision below. (Petitioner's Appendix at 59.) Second, there is no conflict between the decision below and *Hopwood*. *Hopwood* involved an equal protection clause challenge to a formal institutional policy of racial preference in law school admissions. The

Hopwood court was asked to determine whether the policy was constitutional. In contrast, Taylor's lawsuit was brought as a challenge to her own termination, not as a challenge to MCC's hiring policies. Consequently, the Fifth Circuit did not decide whether the equal protection clause was violated in that regard. Finally, the Petition ignores the fact that the summary judgment in this case ultimately turned on Taylor's failure to raise a genuine issue of material fact tending to show that the Respondents' reasons for her termination were pretextual.

C. Petitioner's First Amendment Claim:

The Petitioner failed to raise a genuine issue of material fact tending to show that, but for her allegedly protected speech, she would not have been terminated.

The Fifth Circuit correctly determined that Taylor had failed to raise a genuine issue of material fact showing that any protected speech was a substantial or motivating factor in her termination. While the Petitioner disagrees with the lower courts' application of the law to her particular situation, she provides no compelling argument for review by this Court.

A First Amendment claim requires proof of three elements: (1) that the plaintiff's speech addressed a matter of public concern; (2) that her interest in speaking on the matter outweighed her employer's interest in promoting efficiency in the workplace; and (3) that her speech was a substantial or motivating factor in her discipline. *See Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690 (1983). Whether speech is protected by the First Amendment is a question of law. *Id.* at 461 U.S. at 147 n. 7, 103 S.Ct. at 1690 n. 7.

A public employee's speech is protected only if it addresses a matter of "public concern." Courts are required to

examine the *content*, *form*, and *context* of speech to determine if it addresses a matter of public concern. *Connick*, 103 S.Ct. at 1690. If the employee speaks in her role as an employee, rather than as a "citizen," the speech is not constitutionally protected. *See Connick*, 461 U.S. at 147, 103 S.Ct. at 1690; *Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1991).

Taylor alleged three instances of protected speech, two of which occurred more than two years prior to her termination. She alleged she and other employees criticized a racially offensive textbook in 1990; the book was removed. (R. 1192, 165). In 1991, Taylor spoke for 30 minutes to an Office of Civil Rights investigator who was investigating another employee's complaint. The Respondent Coronado had facilitated the meeting between Taylor and OCR. Taylor conceded below that the "essence" of her speech to OCR concerned her own personal situation (*i.e.*, the assignment of Dr. Henderson as her supervisor). (R. 1192). Taylor acknowledged that her two direct supervisors, Jones and Garrett, were not even employed by MCC when the speech in 1990 and 1991 occurred. (R. 767).

Taylor alleged below that the third instance of protected speech occurred in July 1992 when she wrote a memo about the plan to advertise Upward Bound positions. (Appellant's Fifth Circuit Brief at 34; R. 532-533; 541-542; 546-547). As previously noted, Taylor's original response to the advertising directive merely was that she did not know that the positions should be advertised. Later, after she was warned about possible termination, she criticized the directive and bemoaned the loss of "control" over the hiring of staff. (R. 1210 exhibit 25 p. 11). Taylor did not want Jones telling her how to run her program or interfering with her ability to hire people she knew. (R. 532-533; 541-542; 546-547). In responding to Jones's memorandum, Taylor was acting as an employee and

coordinator of Upward Bound, not as a private citizen. (R. 536; 543-545).

The analysis of whether Taylor engaged in protected speech ultimately is immaterial because, even if she did engage in protected speech, summary judgment was proper because Taylor failed to support the other elements of this claim. In particular, she failed to raise a genuine issue of material fact tending to show that, but for her alleged speech about discrimination, she would not have been terminated. (Petitioner's Appendix at 30-36 and 57.) In *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977), the Supreme Court held that a plaintiff must show that his protected conduct was a substantial or motivating factor in the adverse employment decision. The burden then shifts to the employer to show that the adverse decision would have occurred even in the absence of the protected conduct. *Id.* If the employer produces evidence of a non-discriminatory reason for the decision, then the employee must show that the reason is a pretext. *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991). Public employees "ought not to be able, by engaging in such [first amendment protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record..." *Mt. Healthy*, 97 S.Ct. at 575.

More recently, this Court has acknowledged that the government "as employer" has broader powers than the government "as sovereign." *Waters v. Churchill*, 114 S.Ct. 1878, 1886 (1994). "When someone who is paid a salary so she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 1887-88. Employers may rely "on hearsay, on past similar conduct, on their personal knowledge of

people's credibility, and other factors that the judicial process ignores." *Id.* at 1888. Courts show great deference to governmental predictions of disruption in the employment setting. *Id.* at 1887; *see also Connick*, 461 U.S. at 151-52 ("when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.") Being rude, displaying negativism, and undermining supervisory authority are examples of potentially disruptive behaviors about which an employer legitimately may concern itself. *See Waters*, 114 S.Ct. at 1890-91. "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Connick*, 461 U.S. at 153.

The summary judgment evidence showed that Taylor engaged in behaviors that her employer appropriately viewed as harmful to positive working relationships. Responding to her superior's office memo by certified mail return receipt requested is but one example of Taylor's hostility toward her superiors. *Cf. Connick*, 461 U.S. at 153 (citation omitted) (in assessing impact of speech, employer may consider not just the content but the "manner, time, and place" of the speech). Taylor failed to raise a genuine issue of material fact that her employer's reasons for the termination were pretextual. Finally, while Taylor has acknowledged that the college president, Dr. Michaelis, was ultimately responsible for her termination (R. 658), Taylor admitted in her deposition that she was not sure how he had violated her First Amendment rights. (R. 831).

In conclusion, the Petition raises no important issues of First Amendment law that require review by this Court.

D. Petitioner's due process claim:

The Fifth Circuit's disposition of Petitioner's due process claim is consistent with this Court's prior decisions and raises no significant issue of constitutional law.

Taylor asserts that she was deprived of a property interest without due process. Once again, the court below correctly stated the law; Taylor merely disagrees with the application of the law to her particular situation. Due process requires, before the final deprivation of a protected interest by state action, that the individual receive notice of the reasons for the action and an opportunity to be heard. *See generally Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). The record shows that Taylor received notice and an opportunity to be heard.

The gist of her argument is that she *disagreed* with the reasons that were given and that she disagreed with the quality of the evidence supporting those reasons. (R. 532-533; 535-545; 1214-1215). Her disagreement with the reason does not change the undisputed fact that a reason was given. (Indeed, her December 1992 EEOC complaint shows that she was well acquainted with the reasons.) Due process is not concerned with the *merits* of an employment decision. *See Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct.1061 (1992).

The record also proves that Taylor had an *opportunity* to be heard before her termination took effect. (R. 481-494). Taylor testified that she knew about the available procedures, but that she *chose* not to use them. (R. 625-626). An employee who does not use available procedures cannot complain about the lack of an *opportunity* to be heard. *See generally Dusgnek v. Hannon*, 677 F.2d 538, 543 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982) (due process is not violated when

procedures are available "and the plaintiff has simply refused to avail himself of them"); *Myrick v. Dallas,* 810 F.2d 1382, 1388 (5th Cir. 1987) (plaintiff cannot skip an available remedy and then complain about due process); *Russell v. Harrison*, 632 F.Supp. 1436, 1442 (N.D. Miss. 1986), *aff'd*, 815 F.2d 698 (5th Cir. 1987) (after being advised of their terminations, it was "incumbent" upon the plaintiffs "to initiate any review process").

Taylor's citation to *Cleveland Board of Education v. Loudermill*, 470 U.S. 550, 105 S.Ct. 1487 (1985), is completely misplaced. In *Loudermill*, the employees were fired and taken off the payroll in one fell swoop; a hearing on the terminations was not available until after a complete loss of pay. The Court was concerned that the employees' wages had been cut off before they had a chance to respond even minimally to the charges. The Court held that, before cutting off an employee's livelihood, some due process must be provided. Where a full post-termination hearing is available, the pre-termination due process may be informal. 470 U.S. at 545. In contrast to the *Loudermill* plaintiffs, Taylor remained on the payroll for more than 40 days after being notified of her termination. She had 40 days in which to request an administrative hearing to contest the decision. She had an *opportunity* to be heard; she simply did not take advantage of it. The Petition provides no compelling factual or constitutional reason to justify granting certiorari.

CONCLUSION

This is not a case involving questions of constitutional magnitude. It is a case about personality conflicts, turf battles, and chains of command. For all of the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: December 16, 1996.

Respectfully submitted,

Ronald Scott
Lisa A. Brown
Bracewell & Patterson, L.L.P.
711 Louisiana St., Suite 2900
Houston, Texas 77002-2781
(713) 223-2900 - Office
(713) 221-1212 - Fax

Attorneys for Respondents